The end of the affair : On the ménage à trois of employment, contract and termination

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by Ferdinand B.J. Grapperhaus

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Rector Magnificus,
Dames en Heren, Ladies and Gentlemen,

1. Introduction

1.1 Employment as a fundamental right

Employment is a fundamental right in modern society.[1] The Declaration concerning the aims and purpose of the International Labour Organization (ILO) points out to us that one of the basic principles of social justice is that '…all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.'[2] All individuals are entitled to exploit and further develop their working capabilities, yet it is necessary to embed employment in a contract in order to secure rights and obligations and make the individual employment fit with the workplace. A contract, however, by its nature is terminable. And here, in the face of termination of the employment contract, the individual employee will always be in a weaker negotiating position than his counterpart, the employer. This has nothing to do with size of the employer, but simply with the concept of ownership. Since the employer has ownership of the work, the workplace and its resources, it is he who is the ultimate decision maker on the distribution of employment, it is the employer who decides who gets access to employment and who does not. So when we return to the fundamental nature of employment for the individual, protection of the worker

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1. On 10 December 1948, the General Assembly of the United Nations adopted and proclaimed that the Universal Declaration of Human Rights *Article 23*(1) of the charter proclaims: 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'; also see International Treaty on economic, social and cultural rights of 19 december 1966, Trb. 1969, 100, art. 6.1: 'The states parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work he freely chooses or accepts, and will take appropriate steps to safeguard this right.'
2. Declaration concerning the aims and purpose of the International Labour Organisation, annex to the constitution of the ILO, Trb. 1975, 102 ('Philadelphia Declaration of the ILO').

against termination is necessary, by which I mean against both unlawful termination and the possible consequences of termination as such.

The ILO defined this in its Convention concerning Termination of Employment at the initiative of the employer[3] in article 4:

> 'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker based on the operational requirements of the undertaking, establishment or service.'[4]

And in article 11 and 12:

> 'A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.'

> 'A worker whose employment has been terminated shall be entitled, in accordance with national law and practice with (a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions (….)'.

So if protection is necessary, a triangular tension is generated between employment, contract and termination, and the question arises: how do we create a form and level of protection that is adequate to preserve the working individual's right of access to employment and all that follows from it on the one hand – and on the other hand protection that does not frustrate or hamper this very same access to employment as well as his position within the workplace? Moreover, how do we achieve protection that does not have a detrimental effect on the worker, the workplace and its development?

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3. Only 33 countries have ratified the Convention so far, among which is not the Netherlands. Nonetheless, the Convention provides a useful guideline and its content is achieved with the consensus of all ILO Member States.
4. ILO Convention no. 158 concerning termination of Employment at the initiative of the employer, 22 June 1982 ('ILO Convention on the Termination of Employment)'.

In other words: if we use the wrong methods to protect the individual worker against loss of employment through termination, we run the risk that the employer may decide not to contract with this employee in the first place.

It is this interesting dilemma that was at the heart of the troubles in France early in 2006, when youth protests broke out on a large scale against a legislative proposal aimed to provide equal opportunities in employment[5]. The proposed statute created a 'first employment contract' (called the *Contrat de Premiere embauche* or CPE). This CPE was a new type of employment contract for youths under 26, which essentially contained a two-year trial period: during the first two years the employer would be able to terminate the contract without having to justify the termination. The central dilemma was: if the legislator reduces the level of employment protection for young workers, they may find it easier to get access to jobs and job experience, but they will also lose what they gained much more easily because of the lack of employment protection in the first two years. Opposed to that, one could argue: if employment protection for young workers without relevant working experience is at the same level for workers who already have such working experience, employers may become increasingly reluctant to hire young workers. The protests that swept through the country forced the Villepin-administration to withdraw the proposal: another law was passed and published very swiftly withdrawing the controversial CPE, replacing it with provisions aimed to help young people with special difficulties to find employment[6].

Protection of individual workers against termination of employment requires a model that is well attuned to modernised economies, which, although perhaps divided into sub-economies of local or specialist nature, are all highly influenced by: (1) internationalisation, if not globalisation; (2) technological developments and the unpredictability of their consequences; and (3) the unprecedented rise of universal communication.

In a recent analysis report McKinsey & Co.[7] points out that today, Asia (excluding Japan) accounts for 13 per cent of world GDP, while

5. Loi no. 2006-396 du 31 Mars 2006 pour l'égalité des chances; Journ. Off. de 2.4.2006.
6. Loi no. 2006-457 du 21 avril 2006 sur l'accès des jeunes a la vie active en enterprise, Journ. Off. 22.4.2006.
7. I. Davis/E. Stephenson, Ten trends to watch in 2006, www.mckinsey&co.com.

Western Europe accounts for more than 30 per cent. Within the next 20 years the two numbers will nearly be reversed. Some industries and services – manufacturing and IT services, for example – will shift even more dramatically. As the researchers write and I quote:

> 'More transformational than technology itself is the shift and behaviour that it enables. We work not just globally but also instantaneously. We are forming communities and relationships in new ways (indeed, 12 per cent of US newly-weds last year met online). More than 2 billion people now use cell phones. We send 9 trillion e-mails a year. We do a billion google searches a day, more than a half in languages other than English. For perhaps the first time in history, geography is not the primary constraint on the limits of social and economic organisation.'

And again:

> 'Ongoing shifts in labour and talent will be far more profound in the widely observed migration of jobs to low-wage countries. The shift to knowledge-intensive industries highlights the importance and scarcity of well-trained talent. The increasing integration of global labour markets, however, is opening up vast new talent sources.'

But this is not all. Already by 2000 more than half of the world's largest budgets were budgets not of states but of multinational corporations or groups[8]. These corporations have taken over the centre of social control and coordination. In this respect states have become less important:

> 'They will continue to be the major players on the world stage but governments will have less and less control over flows of information, technology, diseases, migrants, arms and financial transactions, whether licit or illicit, across their borders.'[9]

Globalization has in the past decades led to Western European economies, voluntarily or involuntarily, developing in the direction of a hybrid of highly specialised industries and services. And where rights and obligations have reached a level of high sophistication in those

8. Lord Wedderburn, Common law, labour law, global law, in: Social and labour rights in a global context, Cambridge 2002, p. 42.
9. US National Foreign Intelligence Board, A dialogue about the future with non-Government Experts, Washington 2000.

same Western European economies, it has become very important to evaluate the models and means for employment protection in those economies, and subsequently improve and implement the necessary changes. What can happen at a micro-economic level could also happen on a national scale: employers denying individual workers access to employment on a national market because the rules of protection are prohibitive.

There should be no misunderstanding of what I am proposing: I am not saying that we, in our Western European economic systems and closely related labour markets, should downgrade the levels of protection for workers back to square one, or to the protection level of those upcoming economies that, among others things, still allow child labour and horrendous working conditions to continue. The fact that the world and especially the markets around us are radically changing, does not mean that we should change our prerogatives on social and labour rights. As the ILO-director wrote in one of his recent annual reports: Values can be defended, even when market demand changes.[10] One should bear in mind as well, as McKinsey also points out in its analysis[11], that '…many emerging-market governments will have to decide what level of social services to provide to citizens who increasingly will be asking for state-provided protections such as health care and retirement security.'

Sciarra draws our attention to the need for rebalancing and re-establishing social rights in an EU market that has been preoccupied with competitiveness as its primary goal. She refers to Deakin and Wilkinson saying that social rights far from being inimical to the effective functioning of the labour market are actually at the core of a labour market in which the resources available to a society, in the form of the potential labour power of its members is fully realised. When commenting on the meaning of the Albany-decision of the European Court of Justice[12] she writes:

10. M. Hansenne, Defending values, promoting change, Director-General's report, ILO, Geneva, 1994.
11. I. Davis/E. Stephenson, Ten trends to watch in 2006, l.c.
12. Case C-67/96, Albany International B.V. vs. Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751.

> 'The inclusion of fundamental rights within the European legal system would not be a mere repetition of existing rights. It would rather serve the purpose of creating a collective area strong enough to interact with competition law.'[13]

So there is every need to reconsider the present means of protection of workers. The greatest challenge is then to establish a system for the protection of workers that on the one hand provides for the rights of workers being sufficiently safeguarded, yet on the other hand in the near future is resilient enough to withstand the dissimilarity of working conditions and pay levels between different parts of communicating markets.

The purpose of this lecture is to establish how this ménage a trois of employment, contract and termination could be resolved to such extent that we can create a protective system that above all is sufficiently protective and helpful to the working individual, but is also as much as possible favourable to his employer, his working environment and, last but not least, favourable to our Western European market position. More specifically I will try to address the question whether protection of employment is well served by a system of prior authorisation, meaning a legal system in which an employer is not allowed to terminate any employment contract unless he has acquired prior authorisation, either from a government agency or from an independent court. Interestingly, the ILO Convention on the Termination of Employment does not mention any requirement of prior authorisation by either government authority or court of law. It merely requires that the employer must give the employee the opportunity to defend himself against any allegations that are ground for an intended termination by his employer.[14]

An overall look into the entire European Community economy and/or its constituent parts of twenty-five member states would require much more than a one-hour lecture, or even sixty-or-so printed pages. As the EU treaty still requires unanimity for EU legislation on the subject of protection of workers where their employment contract is

13. S. Sciarra, Market freedom and fundamental rights, in: Social and labour rights in a global context, Cambridge 2002, p. 110.
14. Article 7 of the ILO Convention on the Termination of Employment.

terminated[15], and as the legislation in most EU member states is still quite diverse, it would be difficult to design a pan-European plan at this moment for a system of protection. I would see it as one of the challenges of my position on this chair in Maastricht to investigate the various national systems more deeply and to try to extract common denominators and shared principles that could be used as building blocks to create such a pan-European design. I adhere to Lord Wedderburn's view that given the conflicting aims of powerful multinationals and weakened states, all means must be considered whereby fundamental labour standards and principles can be created, upheld and enforced in the global market, and I would think that harmonisation of EU labour law would certainly seem be an aid to that purpose. [16,17]

1.2 Prior authorisation within Western Europe

As regards the subject of prior authorisation, it is easy to observe that most Western European systems do not have a system of prior authorisation for termination of employment. From a recent survey in twelve EU member states[18] it follows that eleven out of these twelve countries do not have any prior authorisation requirements for termination of employment at all. Indeed all these countries have in one form or another implemented the EU Directive on the approximation of the laws of the Member States relating to collective redundancies,[19] although it should be noted that this Directive only deals with consultation and negotiation between employer and

15. Article 137.1 under (d) in conjunction with article 137.2 and article 251 of the Treaty Establishing the European Community, as amended in accordance with the Treaty of Nice Consolidated Treaty (OJ 2002 C325/1-184) and the Accession Treaty (OJ 2003 L236/17).
16. Lord Wedderburn, l.c. p. 50.
17. I would not agree with Sciarra l.c. p. 102, that it is arguable 'that diverse national systems of labour and social law across the member states of the EU enhance the competitiveness of the EU as a whole, provided core labour standards are maintained'.
18. Survey on individual dismissal rights in Belgium, Czech Republic, France, Germany, Hungary, Italy, Luxemburg, Netherlands, Poland Slovakia, Spain and UK, publ. Allen & Overy 2005, www.allenovery.com.
19. EU Directive on the approximation of the laws of the Member States relating to collective redundancies. Orig. 75/129, later 92/56, now 98/59 of 20 July 1998, full text publication as in Blackstone EC Legislation, 2005-2006, 16th Edition, Oxford (UK) ('EU Directive 98/59').

workers' representatives, and it only requires a notification by the employer of any projected collective redundancy so as to enable the competent public authority *'....to seek solutions to the problems raised by the projected collective redundancy'*, which of course is not the same thing as prior authorisation. Also, the rules on unfair dismissal in most of these twelve countries are elaborate, to say the least, and can result in the annulment of the dismissal, in certain countries even allowing the option of reinstatement by the court. Often, they result in additional compensation, payable to the employee. In most countries, some level of severance pay based on a fixed formula is due in any dismissal situation, with the exception of dismissals for urgent cause, yet the legitimacy of the dismissal itself can only be tested afterwards: there is no such thing as prior authorisation.

There was a prior authorisation system in France, which was abolished in 1975 except for dismissals on commercial grounds. In 1986 the scheme was abolished entirely.[20] In Spain, government authorities can block a collective redundancy in the fifteen days following the end of negotiations between unions and employer[21], but such a system does not result in a full prior authorisation system. In Germany a non-binding advice from the Betriebsrat, the works council, is required for an intended dismissal, relating to redundancy; a rule that can hardly be seen as prior authorisation. The UK certainly has no prior authorisation system. The fact that the British have statutory dispute resolution procedures, together with a *Code of Disciplinary Practice and Procedures in Employment* which deals with rules of internal procedures in case of an intended dismissal, and the fact that they have in place an optional voluntary mediation system in case of a dismissal through the Advisory Conciliation and Arbitration Service (ACAS)[22], all show that a sophisticated level of protection has been set up to protect employees against unfair or unlawful loss of their unemployment – but all these systems are a long way from prior authorisation.

But still; in eleven out of twelve countries no prior authorisation for termination of employment is required.

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20. See L. van der Geest a.o., Bescherming en economische efficientie: een alternatief ontslagstelsel, NYFER Institute June 2000.
21. Article 51 paragraph 5 of the Workers' Statute and – in more detail – article 11 of the Royal Decree 43/1996, 19 January 1996.
22. www.acas.org.uk.

There is one small country, however, that has such a system, and many decision makers its labour market claim that this concept of prior authorisation forms the foundation of its so-called 'polder' success. If nothing else, the fact that eleven out of twelve EU member states, never have bothered to set up this kind of – allegedly – successful system, begs for a closer look at this small country. As if we were the readers of an Asterix adventure when at the beginning its authors take us from a bird's-eye view nearer and nearer towards 'that one small village of indomitable Gauls that still holds out to the Roman invaders', as the books invariably begin, let us look at the one country that 'holds out' among the other EU-countries in its very own protective system of employment termination, not just for that very extraordinary *poldermodel* of employee protection, but primarily because the Dutch have a system that dates back to the Second World War and has been the subject of discussion for decades.

I would like to use today's lecture to see what lessons can be learned from that very Dutch Model. Does the poldermodel really represent the best possible solution for proper and proportional employees' protection in a future that may show a war of the markets and economies?

So let us take that closer look.

1.3 A general outline of the Dutch system

The Dutch system is a so-called *dual system* of protection, afforded either by the governmental authority Centre for Work and Income (CWI), or the Cantonal Court Section of the District Court.

The following general rule lies at the heart of the Dutch legal system regarding employment termination. In the Netherlands, with the exception of situations of mutual consent between parties or dismissal for urgent cause (*ontslag op staande voet*), an employment contract may not be terminated lawfully without prior authorisation:

1. either through prior approval from the CWI; or
2. through a court decision to dissolve the contract on serious grounds (*ontbinding wegens gewichtige reden*).

As of now I will use the term 'prior authorisation' (in Dutch: *preventieve toets*) as the family name for these two different authorisation forms. And I will use the term 'termination' as a generic term for all forms of termination of employment relating to the capacity or conduct of the

worker or based on the operational requirements of his employer's business. This means that this lecture is not about any form of unlawful termination on ground of handicap, disease, union membership, membership of a works council, pregnancy, sex, race, colour, belief, marital status, religion, political opinion, social origin or sexual orientation. [23]

Hence the central question of today's lecture is:

> Is a system of prior authorisation through either a government body or an independent court the appropriate method of protection for employees against undue termination?

Consider that we are, here, in the phase of the relationship where at least one party feels it's the end of the affair. The triangular tension of employment, contract and termination is suddenly transformed – when the end of the affair is nigh – into a triangle of protection, cost and practicability: the latter not only for the employer, who might want to get rid of his employee, but also for the employee, because at the end of every affair, of whatever nature, the essential question inevitably arises: should I stay or should I go?

A closer study of the Dutch situation is also interesting because of the intense nature of the debate on this subject in past decades. Prior authorisation was not a subject open to nuances in the discussion. You were either for or against it. More than one proposal to change the system was launched but withdrawn long before the finishing line, as shown by Verhulp in an article from 2004.[24]

I would like to take a closer look at the prior authorisation system's history, its facts and statistics, its practical truth or untruth, and of course the philosophy and meaning that lies behind it.

I shall begin with a short history of employee protection under Dutch law in the last two centuries.

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23. As listed in articles 5 and 6 of the ILO Convention on the Termination of Employment.
24. E. Verhulp, Ontslagrecht in beweging?, in: Ontslagrecht in beweging, 's-Gravenhage 2004, p. 11-12.

I do realise that every historic account has its subjective elements. Anyone who wants to criticise my perspective from the onset, can start by picking some soft targets, such as pointing out that I was born *post-baby-boom*, that I have never tasted Dutch tulip bulbs in wartime, that I was nowhere to be found – not even conceived – at the great flood of 1953 (*Watersnoodramp)*, and that I merely associate the great oil crisis of 1973 with the strange phenomenon of carless instead of careless Sundays. But that doesn't render my perspective any less valid than that of anyone else. Let me quote to you the first line of that great novel of Graham Greene, 'The End of the Affair', where he writes:

'A story has no beginning or end: arbitrarily one chooses that moment of experience from which to look back or from which to look ahead.'[25]

2. A brief history of the Dutch system[26]

Originally the Dutch Civil Code (DCC) of 1838 did not contain any provisions for the protection of employees. Employers were entitled to get rid of employees without any compensation or specific notice period. It was not until 1907, following the implementation of the Employment Contract Act, that the Dutch legislator tried to give the employee some protection: the employer from then on had to observe a certain notice period – still short compared to present standards, but at least providing the employee with some security. But the rules of termination were abstract, in that the ground for termination could not be tested before a court.

When the Germans occupied the Netherlands in 1940 they very soon decreed that employment contracts could only be terminated after approval was acquired from the authorities. The German administrators claimed this was done to avoid mass unemployment; however, one could argue that the true reason for implementing this requirement for prior approval was to be able to monitor the employment market and have more of an overview on who and how many people might be available for the war industry in the German homeland. This can be deduced in my view also from the fact that as

25. Graham Greene, The End of the Affair, first published by William Heinemann Ltd of London in 1951, excerpt taken from Vintage Books Edition 2001, page 1.
26. See C.G. Scholtens, Evaluatie artikel 6 BBA, historie en toekomst, SMA ed. 1992, p. 476 et al., C.G. Scholtens, Evaluatie artikel 6 BBA, historie en toekomst (II): Wanneer wordt het vrede?, SMA 2003, p. 292 et al., C.G. Scholtens, Ontstaansgeschiedenis van het ontslagverbod van artikel 6 BBA in 1940-1945.

of 1943 not only employers, but also employees were obliged to ask for prior approval. The Dutch War cabinet, when preparing emergency legislation for the period directly after the end of WW II, decided to continue this system of prior approval out of fear of chaos on the labour market directly after the war. So then the Extraordinary Decree on Labour Relations, the *Buitengewoon Besluit Arbeidsverhoudingen*, was born, in 1945. It may interest those with a passion for war history that the decree was signed by General Winkelman, supreme commander of the Dutch armed forces. The prior approval requirement was hence retained. Originally it was the Director of the County Labour Bureau, (*Directeur Gewestelijk Arbeidsbureau*), who was the competent authority in this field. Later, between 1991 and 2002, it was the Regional Director of Employment Strategy, the RDA, and as of 2002 the assessment is made by the – regional – Centre for Work and Income, the CWI.

It should be noted that the authority that decides on approval permits for termination of employment contracts is a government body, coming under the responsibility of the Ministry of Social Affairs and Employment (*Ministerie van SZW*).

Although the Decree of 1945 and the derivative rules based upon it have indeed been modernised since 1945 and prior approval is no longer required for employees[27], the system of prior approval is still in force today as it was in 1945 – and technically more or less still the same as the German occupation forces intended in 1940 – for some like myself a harrowing thought, for others perhaps more evidence that truth is stranger than fiction.

Meanwhile, in the arena of the Civil Code, matters relating to the termination of employment contracts developed as well. Since an employment contract still falls within the scope of civil law, being a contract between two autonomous contracting parties, it became clear in the 1950s that a change was required to achieve adequate protection for workers. In 1953 a large-scale modernisation of Dutch employment law led, among other things, to the inclusion of the rule of manifestly unreasonable dismissal, *kennelijk onredelijk ontslag:* if an employer terminated the employment contract under circumstances that qualified as manifestly unreasonable, the employee could afterwards

27. The prior approval requirement for employees formally disappeared following the Act on Flexibility and Security in Employment that came into force on 1 January 1999. Before this time, the Netherlands was found to be in breach of the treaties on forced labour, such as the ILO Convention no. 29 on Forced Labour: see e.g. the observations of the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), 1990, 60th session.

(that is: after prior approval had been given and subsequent notice by the employer had followed) claim a severance payment from the court. Then, from the 1980s onwards, the original 'dead letter' of the possibility to ask for dissolution of the employment contract by the competent cantonal court[28] began to gain more and more significance in practice. Apparently employers found the prior approval proceedings under the Decree of 1945 too slow or time- and energy consuming. Also, whereas the competent CWI could refuse permission quite easily if it found that it was not in the interest of the labour market situation – very interesting when we realise that this is about individual dismissals –, the cantonal court could still dissolve the contract if it found there were serious grounds, *gewichtige redenen*, for such dissolution, which in most cases could already be found in the presence of a strained working relationship – whatever that is or may be. And so it developed into a practice where at the turn of the century, and in the years since then, the number of court dissolutions of employment contracts, around 70,000 a year, and the number of CWI-terminations after prior approval, around 80,000, have been more or less in equilibrium.

The cantonal court judge is independent and does not in any way have to justify his decision to any government authority; nor is he obliged to follow any policy set out by the cabinet. The cantonal court judge is empowered to award a fair and reasonable severance payment to the employee, if he decides to do so, whereas the CWI cannot in any way order the payment of a severance or redundancy payment or even put pressure upon the employer to do so.

Setting aside the differences between the cantonal court proceedings and the CWI proceedings, they both have one common denominator: during the years in which the prior authorisation system, of which each form of proceedings is a species, developed, it progressively achieved its main objective, which was to offer protection to employees against the danger of being lightly dismissed, or should I say: against light dismissal (by which I mean a dismissal that has no sufficient justification).

But this is not yet the whole story.

First of all, collective dismissals have been regulated for the past decades by the Collective Redundancies Act, which in fact followed

28. On the history of this article see: C.J. Loonstra, Het bereik van de ontbindingsprocedure ex art. 1639w BW, Nijmegen 1995; and C.J. Loonstra, De kantonrechter als arbeidsrechter, Deventer 2000.

from the EU Directive on the approximation of the laws of the Member States relating to collective redundancies.[29] Yet in the case of a collective redundancy, prior approval of the CWI is still required.

Secondly, in 1999 the Act on Flexibility and Security in Employment was implemented in the Dutch Civil Code. This Act introduced, among many other new provisions, the possibility for employers to extend fixed term contracts for up to three years – and even allowed them to extend that period further, provided that this was agreed with the unions in a collective bargaining agreement.

Thirdly, the Dutch Civil Code of course contains some powerful provisions to ensure the protection of pregnant women, sick people and works council members. The contracts of employees who fall into any of those categories may not be terminated, either by a court decision to dissolve the contract or by giving notice after prior approval, if the reason for termination is related to pregnancy, sickness, disability or works council membership.

Fourth, a dismissal for urgent cause, *ontslag op staande voet*, does not require dissolution of the contract by the court or prior approval by the CWI. Dismissals for urgent causes are those rather clear-cut cases of theft, fraud, gross misconduct and unacceptable behaviour.

Fifth, and finally, from 1 October 2006 the Dutch Unemployment Insurance Act (UIA), the *Werkloosheidswet (WW)*, will perhaps for the first time ever have a very clear requirement for the refusal of unemployment benefit to an employee who has lost his job: in short, he must have been dismissed with urgent cause. Until 1 October 2006, the UIA has been using the criterion that an employee who could be held responsible for the loss of his job could be refused unemployment benefit. In many cases, where there was no urgent cause for dismissal at all, this has led to the standard practice of employer and employee in fact being in agreement about the desire for termination of the contract, the end date, and the severance payment to be paid, purely formally requesting a court decision for dissolution, or also purely formally, requesting approval from the CWI, in which proceedings they unequivocally stated that the employee was not to blame for the termination and in that respect was not responsible for the loss of his job; all this simply to safeguard the employee's right to unemployment benefit. It goes without saying that these formal proceedings had no more than a ritual meaning, which went even so far in the formal court proceedings that parties informed the court or the CWI that they did not wish any court hearing.

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29. EU Directive 98/59EC of 20 July 1998, *Eurlex* 319998L0059.

As we will see later, the Ministry of SZW expects that the number of cases before cantonal courts and CWI will decrease by a total of 60,000, two-fifths of the present total number of cases.

3. The facts and statistics of the prior authorisation system

When lawyers leap towards statistics and empirical evidence, a caveat is not out of place. Whether this comes from a lack of mathematical understanding of your average lawyer or from lawyer's second nature, as a species, to jump to conclusions, is not for me to say. In any case, if one looks at figures, facts and statistics it is not at all necessary to choose sides in the everlasting debate on whether they tell the truth or just lies. Every picture tells a story, and in my opinion the same applies to statistics, figures and facts.

3.1 Number of prior authorisation proceedings

In the past three years the number of prior authorisation proceedings was as follows[30]:

	2005	**2004**	**2003**
Through CWI	74450	89494	85881
Through Cantonal Courts	67608	72011	78491
Total	142058	161505	164372
Relative relationship between number of CWI and Cantonal Court cases	1,1:1	1,24:1	1,1:1

The comparative relationship between CWI-cases and Cantonal Court cases has been more or less the same since 1998, the CWI slightly outnumbering the Cantonal Court in all years except 1998. The year 2005 saw a first reduction in both forms of prior authorisation proceedings, and it looks as if this will continue in 2006, even without taking into account the abolition of so-called formal proceedings as of 1 October 2006. In the first quarter of 2006 the number of CWI-proceedings was down 26%, more significantly the requests for

30. Data from Jaarrapportages Ontslagstatistiek of het Ministry of SZW of 2000-2005 ('Ontslagstatistiek SZW'); C.J. Loonstra and P. Kruit, Statistiek Ontbindingsvergoedingen 2005: een jaar van stabiliteit, in the practical law review Arbeidsrecht, Edition 2006, 6/7, nr. 38 ('Loonstra/Kruit').

approval on economic grounds was down 32%. It seems that the recovery in the economy is the main reason for this. Loonstra and Kruit in their annual article on the subject of statistics on severance payments[31] claim that there was no economic recovery in 2005, which in their opinion means that the reason for the drop cannot be found in market developments, but I tend to disagree with them.

The percentage of economic growth in the Netherlands in 2005 was 1, 5% and in the first quarter of 2006 already was 2, 9%[32]. Interesting further evidence of economic recovery can be found in the growth in turnover of temporary employment agencies since 2004, always an indicator of the beginnings of economic recovery and growth[33].

3.2 Estimated number of formal proceedings

There are no exact statistics available about the number of formal proceedings included in the statistics on CWI and cantonal court proceedings, mentioned in para 3.1.

The Ministry of SZW[34] has presented some fairly accurate estimates in the Parliamentary documentation on the recent Amendment of the Unemployment Insurance Act. Here, the Ministry estimates the number of formal proceedings before the cantonal court to be 45,000 per year, and the number of formal proceedings before the CWI to be 20,000 per year, based on the existing total numbers of approximately 70,000 cantonal court proceedings and 75,000 CWI proceedings per year over the past couple of years.

This would mean that, based on the 2005 statistics, the estimated numbers for CWI and cantonal court proceedings for 2007, other factors absent such as economic recovery, would be as follows

	2007
CWI	55,000
Cantonal Court	25,000
In total	80,000

31. Loonstra/Kruit, p. 20.
32. Statistics from the Dutch Central Bureau of Statistics, see www.cbs.nl.
33. A brief yet interesting analysis of this phenomenon can be found in NRC Handelsblad, financial pages, edition of 22 July 2006.
34. See the Nota naar aanleiding van het Verslag 30370, p. 63.

The implementation of the Amended Unemployment Insurance Act on 1 October 2006 will therefore already result in the number of prior authorisation proceedings being almost halved.

3.2.1 The cost saving as a result of the abolition of formal prior authorisation proceedings

As we have seen, the Amended Unemployment Insurance Act will result in the abolition of formal prior authorisation proceedings. In all those cases where parties have a serious desire to agree on termination and severance pay by mutual consent, where there is no urgent cause at play, they can simply agree on termination, set an end date for the employment contract, deal with the severance pay and subsequently each go their own separate way without the necessity of a formal authorisation of the CWI or the cantonal court. The cost saving for all parties concerned is quite substantial.

	administrative costs	**out-of-pocket expenses**
Employers	€ 9 million	€ 100 million
Cantonal Court	€ 4 to 5 million	
CWI	€ 1.5 million	

The out-of-pocket expenses of employers are court costs, lawyers costs and costs of employment (extra wages during the duration of the proceedings).

The total administrative costs for employers as a result of the present rules and legislation on employment termination amount to € 65 million, which means that a cut in proceedings by half through the abolition of formal proceedings alone would result in a reduction of 14%.

3.3 Reasons for termination in CWI-proceedings

There are no statistics available relating to the various reasons for employers to request for dissolution of employment by the court. However such statistics are available when it comes to CWI-proceedings.

Employers present various reasons when requesting prior approval for termination from the CWI:

	2005	2004	2003
Individual cases			
Economic/Financial Reasons	56%	57%	54%
Sickness/Disability	22%	21%	25%
Other reasons	7%	6%	6%
Collective dismissals for economic/financial reasons	15%	16%	15%
In total	100%	100%	100%

Termination in the case of sickness/disability is only allowed through dissolution if the grounds for termination are entirely unconnected to the sickness or disability. Termination by giving notice after having acquired the approval of the CWI is only allowed if the sickness or disability has continued for at least two calendar years.

This is a very interesting aspect of the system, because a worker who has become chronically ill still merits his seniority and years of service in the company. Yet because he has been ill for these two consecutive years, he completely loses sight of entitlement to a severance payment related to the years of seniority that he built up before his chronic illness struck him.

3.4 Costs of prior authorisation proceedings

There are a number of sources to turn to when trying to determine the costs incurred by employers when seeking termination.
In 2000 the independent research agency 'Research voor Beleid' carried out research at the request of both the Ministry of Justice and the Ministry of SZW[35]. The agency researched the cost of termination for employers in proceedings for prior authorisation. These costs, so it appeared, amounted on average to € 5,000 for every CWI-case and € 27,000 for every cantonal court case. These costs include:
– costs of continuation of wages during the proceedings;
– costs of severance pay;
– costs for (external) legal support;
– other costs.

35. R.G. Van Zevenbergen en U.H. Oelen, 'Het duaal ontslagstelsel – beëindiging van arbeidsrelaties in de praktijk: eindrapport', Ministerie van Sociale Zaken en Werkgelegenheid, Den Haag, 2000 ('Research voor Beleid 2000').

Very recently, research was carried out at the request of the Ministry of SZW into how employers experienced the system of prior authorisation[36].

In the report on this research employers mention the following cost categories as weighing heavily in order of significance:

In the case of CWI-proceedings
- Internal costs 79%
- Costs of continuation of wages 28%
- Costs of external (legal) advice 23%
- Costs of establishing a social plan in the case of collective redundancy 8%.

In the case of cantonal court proceedings
- Severance payments 76%
- Costs of external advice 74%
- Internal costs 55%
- Costs of the proceedings 34%
- Costs of continuation of wages 9%
- Costs for mediation 4%
- Costs for outplacement 4%.

It is notable that both studies show that the cantonal court proceedings have one important cost consideration for employers, which is the fact that the cantonal court can award a severance payment to the employee. This is all the more visible when we see that in a cantonal court case the employer gains cost advantages in the field of wage continuation. The following demonstrates this:

3.5 Costs of prior authorisation proceedings: wage continuation effects compared

Wage continuation depends on the length of the proceedings and the time period between the first day of informing the employee of the wish to terminate the contract and the final end date of the contract. Comparing the two, the time frame with CWI-proceedings and cantonal court proceedings is as follows:

36. Bureau Bartels, Onderzoek ontslagrecht ervaren door werkgevers, 2006.

	Cantonal court	**CWI**
Informing employee of the intention to terminate	*day 1*	*day 1*
After short negotiation, request for authorisation	*day 10*	*day 10*
Hearing	*day 35*	*not applicable*
Decision	*day 50*	*day 52*
End date	*day 60-80*	*day 82-232*

In both situations we assume a ten-day period for talks and negotiations, which period is in any event necessary to give the employee the opportunity to react to the employer's notification of his intention to terminate.

In principle it should be possible for the cantonal court to set a date within four weeks, as required by article 7:685 Dutch Civil Code. Since the proceedings have so-called informal rules of evidence, the judge is subsequently able to reach a decision within fourteen days. He will in most cases declare the end date to be shortly after the date he gives his decision, once again because the concept of article 7:685 DCC is based on the necessity of a swift termination. The notice period does not have to be taken into account, as the employment contract will end through dissolution by the cantonal court. However, in some cases cantonal court judges tend to give an extra month, if the employee has an extremely extended notice term of, for instance, six months.

According to the Dismissal Statistics (*Ontslagstatistieken*) of the Ministry of SZW regarding 2005 and the first quarter of 2006, the maximum time needed by the CWI for handling proceedings in an individual case is six weeks on average.
So on day 42 the CWI would be able to render a decision, but the employer must still follow the rules of notice. The notice term may vary from one month up to twelve months, but in most cases notice terms will not exceed four months.

Still, inevitably, the end date in a best case scenario under CWI proceedings will be later than the end date in a worst case scenario under cantonal court proceedings.

3.6 Employers seem to favour cantonal court proceedings over CWI-proceedings

From the 2006 research report of Bureau Bartels[37] it clearly follows that employers favour cantonal court proceedings over CWI-proceedings, especially in cases where there is a conflict or where an employee's personal circumstances are at stake. Large companies in particular prefer cantonal court proceedings, whereas smaller enterprises favour CWI-proceedings. Both the research reports of Research voor Beleid of 2000 and Bureau Bartels of 2006 report that employers favour CWI-proceedings over cantonal court proceedings when applying for prior authorisation because of the cost effectiveness. In fact 79% of all employers see the low cost of CWI-proceedings (no external legal advice necessary, no severance pay) as their greatest advantage.

Research done in 2005 on behalf of the Dutch Organisation for Medium and Small Enterprises (MKB)[38] shows that, generally, the members of this organisation experience the present rules of prior authorisation as a hindrance, both to employment as well as to laying off of staff. These small and medium sized entrepreneurs are on average satisfied with the way the cantonal courts handle their cases, but they are unhappy about the way the CWI handles their cases. This is remarkable when we take a closer look at the willingness of the CWI to cater for the needs of the employers.

3.7 Some statistics on the effectiveness of the prior authorisation requirement

It yet remains to be seen in how many cases prior authorisation is indeed granted or refused.

3.7.1 The CWI's willingness to serve

A very interesting statistic deals with the number of approvals and refusals to approve issued by the CWI[39].

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37. Bureau Bartels 2006, p. 6 and 47.
38. TNS/NIPO research, on behalf of MKB Nederland, 2005.
39. Ontslagstatistieken Ministry of SZW, 2001-2005.

	2005	2004	2003	2002	2001
Approval granted	85%	84%	83%	83%	83,7%
Approval refused	7%	8%	6%	5,4%	5,3%
Request for approval withdrawn	8%	8%	10%	11,6%	11%

Although these numbers do not entirely reach Ceausescu-style election results levels, one cannot avoid the impression that the road to termination through the CWI leads to a fairly predictable outcome.

To dispel any doubts, this particular statistic has nothing to do with research based upon interviews on the subjective satisfaction levels of employers. This statistic shows the cold and hard facts of the outcome of CWI-proceedings regarding prior authorisation.

I do realise that these statistics still include the so-called formal proceedings that, of course, have a 100% success rate, but taking these 20,000 or so per year out of the equation still leaves us with an overall success rate in the remaining 60,000 or so material proceedings, where the employee challenges the request for approval, of at least 81,25%!

3.7.2 The cantonal court's willingness to serve

As regards the cantonal court proceedings, it is a bit more difficult to establish the success rates for employers. There are however three roughly accurate sources to establish that rate. The first one is the previously mentioned statistic on published case law, only dealing with material cases, which shows that in 2005 in only 17 per cent of the published cases the request for dissolution was denied by the court[40]. However that figure may not be accurate as the published case law tends to the extraordinary and we may expect the refusals to be overrepresented.

There are however other, perhaps more accurate sources to approximate the success rate of requests for dissolution. Firstly, from the research report of Bureau Bartels of 2006, it follows that 70 per cent of the employers see as the greatest advantage of the cantonal court proceedings: the high level of certainty on the outcome of the proceedings. From the research done by Research voor Beleid it follows that 87% of the employers that were interviewed had not

40. Loonstra/Kruit, page 22.

experienced a rejection of their dissolution request in the preceding two years, and this research estimates the number of rejected dissolutions to be no more than approximately 3,5% per year.[41]

The statistic of published case law of course does not include the so-called formal proceedings, as they are not in any way interesting or otherwise fit for publication. The Research voor Beleid statistic could however be influenced by the formal court proceedings with their 100% success rate. So when one takes these out of the equation, a number of 45,000 formal court decisions out of the total 70,000 cases, still a very high 94,25% success rate would remain for getting the dissolution of the employment. I daresay Uncle Nicolae would still be very impressed.

I do realise that the lack of statistical accuracy here may seem to do injustice to the learned magistrates, some of whom may even be present in this university hall today. Any such injustice could easily be undone by a judiciary-wide survey on all cantonal court dissolution cases of the past 5 years, showing that my assumptions about the eagerness of cantonal courts to terminate contracts, based on the statistic material we do have, are wrong, to which research, by the way, the University Maastricht would of course be glad to give a helping hand.

My personal conclusion, as an employment lawyer, based on the above would be: if you want to achieve a swift and cheap termination, take the CWI-proceedings route – satisfaction almost guaranteed with their 81,25% success rate, leaving the formal proceedings out. Yet in practice I wouldn't follow the CWI-route because after CWI-proceedings, as we have seen, the employee may still file a claim for severance pay on the ground of manifestly unreasonable termination. The second best option would then be cantonal court proceedings, which still yield a satisfaction-guaranteed chance of up to 94,25%, if we would go on the estimate from 2000 of Research voor Beleid that in only 3,5% of the cases dissolution is denied, and take the formal proceedings out of the equation.

The cantonal court can always dissolve, regardless of sickness or disability of the employee, provided the ground for the requested dissolution does not relate to the sickness or disability.

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41. Research voor Beleid 2000, p. xiii.

This shows that the main objective of the prior authorisation system, protection of the employee against 'light dismissal', is in practice no longer achieved, to put it mildly.

3.8 Costs of prior authorisation proceedings: extra costs for the government

In 1999 the Minister of SZW appointed an independent advisory commission of experts, commonly known as the Rood-Commission after its chairman[42], more or less at the demand of the Dutch Senate, in exchange for the willingness of the Senate to let the Flexibility and Security Act of 1998 pass. In 2000 the Rood-Commission presented a report in which, among other things, it investigated the financial effects of abolition of the present prior authorisation system.

Based on its own investigative activities, data provided by the Ministries of Justice and SZW, and research done by an independent agency for the two Ministries at the request of the Rood-Commission, the Rood-Commission came to the following observations regarding the extra costs for the government in case of implementation of a system of employment termination without prior authorisation. Before going into these observations it should be noted that the Rood-Commission, as its first assumption, fixed the number of prior authorisation cases per year at 80,000, which was indeed in those years, 1998-2000, the actual total number of CWI and cantonal court cases, and coincidentally is the same as the estimated number of cases after 1 October 2006 upon the abolition of the formal proceedings.

The Rood-Commission then assumed that if total abolition of the CWI as well as dissolution proceedings would be implemented, there would be a worst case scenario of a rise in the number of cantonal court cases for manifestly unreasonable termination to 88,000 cases. This would according to the calculations made on behalf of the Rood-Commission lead to an extra cost for the Ministry of Justice of € 11 million, but also to a cost saving at the Ministry of SZW of € 9 to 11 million.

The reasoning of the Rood-Commission on this point however contained an important flaw. It does not take into account that a certain percentage of the remaining total CWI and cantonal court proceedings of 80,000, that is the remaining number of cases after

42. Officially named: Adviescommissie duaal ontslagrecht, its report: Adviescommissie Duaal Ontslagstelsel, Afscheid van het duale ontslagrecht, Den Haag, 2000.

formal proceedings have finally been abolished, relates to situations where no out-of-court settlement could be reached because either the employer or the employee refused to settle on reasonable terms considering the circumstances. If a legal system of severance payments were to be introduced simultaneously with the abolition of prior authorisation, as was the suggestion of the Rood-Commission, it is more likely that many employment contracts will simply end with a notice and payment of the standard legal severance payment. How fewer cases this will result in can hardly be calculated.

In my view there is no evidence at all upon which one could reasonably build the expectation that the costs of a system without prior authorisation but with the obligation for the employer to pay a severance payment will lead to more costs than the present system. In so far as there is a belief that at the start more cantonal court judges would be required because of the extra influx of new cases, which I doubt, it would seem that a large pool of experienced employment lawyers now working for the to-be-abolished-CWI would become available. Given the limitations posed upon me here and now I will not explore any further on this subject, but an analysis based on recent data should give the exact cost positions of both the Ministry of SZW as well as the Ministry of Justice in a short time.

3.9 The cheap way out: a three-year-fixed term contract

As I pointed out at the beginning, the Flexibility and Security in Employment Act of 1998 created the possibility to extend fixed term one-year contracts to up to three years. This means that an employee who has been working in a company for three years can be dismissed without any formality, let alone the need for any prior authorisation. That would seem very harsh in comparison to his colleague who joined the company on the same day on the basis of an indefinite term, and who can simply claim protection under the prior authorisation system, should the employer wish to terminate his or her contract after 3 years. But that is not all.

Article 7:668a Dutch Civil Code, which defines the most important rules on fixed term contracts, allows for parties to a collective bargaining agreement to derogate from the maximum number of contracts and a maximum period of 3 years for one-year contracts. In 2004 a research report was published by the Ministry of SZW, which showed that in 38 per cent of the collective bargaining agreements parties derogated from at least one of the minimum rules of article 7:668a Dutch Civil Code.

In 5 per cent of the collective bargaining agreements all limitations on the number of fixed term contracts were set aside. In 4 per cent of the collective bargaining agreements the maximum period of three years was prolonged. In 2 per cent of the collective bargaining agreements all limitations on the number of contracts or the duration of fixed term contracts were set aside. This means that in more than 10 per cent of all the collective bargaining agreements the number of fixed term contracts is stretched beyond the legal maximum, which opens up new means to circumvent the prior authorisation system even more. It would seem to me that there should be an overall non-distinctive rule that seniority and severance rights do not start until after an employee has spent more than – say – one year in continuous employment with his employer. Such a rule would also be in line with international law, such as the ILO Convention on the Termination of Employment, which by the way has not been ratified by the Netherlands. The ILO Convention on the Termination of Employment aims at providing employees with some form of protection against dismissal. As an example article 11 of the Convention reads as follows:

> ' A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period'.

It then deals with an alternative and non-cumulative requirement: the employee should receive either a notice period or a severance.[43] In my

43 Coming back to the French upheaval on the CPE: during the turmoil on the new Bill, the *Cour de Cassation* came with an interesting ruling on the acceptability of a trial period of 6 months (Cour de Cassation – Chambre sociale, X/Euromédia Télévision, arrêt no. 906, 29 March 2006.). It concerned a man who was fired during his first six months and subsequently claimed a compensation based on ILO Convention no. 158. The French law did not offer any recourse since an employee can be fired at will without any entitlement to a notice period or severance pay The Supreme Court ruled that the French regulations on this point are in line with the Convention since it concerns a permitted exception, namely 'workers serving a period of probation or a qualifying period of employment, determined in advance *and of reasonable duration*'. A six months probationary period did in effect constituted 'une durée d'ancienneté raissonnable'. As rightly pointed out by the

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view, in the absence of one of these two, article 7:668a DCC can be considered to be in violation of said ILO Convention.

Moreover, as said before, the ILO Convention on the Termination of Employment requires a severance allowance or other separation benefits for a worker whose employment has been terminated, 'the amount of which shall be based inter alia on length of service and the level of wages'.[44]

3.10 Some conclusions from the statistics

The two most important conclusions to be drawn from all this empirical material are of a very different nature. The first one is that both CWI-proceedings and cantonal court proceedings have a high rate of success in acquiring the authorisation itself, with the CWI-proceedings running ahead of the cantonal court competition in circles of small and middle sized companies for reasons of cost efficiency. One does not have to be a cynic to conclude that the prior authorisation system no longer provides much consolation, let alone protection to the average individual employee, when considered from the perspective of this first conclusion.

The second conclusion is that the prior authorisation system can be grossly unfair at certain points: I drew attention earlier to the chronically disabled individual worker who, thanks to the prior authorisation system, may lose his job after two years of sickness or disability, with the possibility of not getting any compensation for his years of service prior to his chronic disease or disability, and I also pointed at the case of the fixed term worker, who may work three years, and in certain collective bargaining sectors even more than three years, without building up any rights of seniority, when it comes down to prior authorisation or severance.

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newspaper *Le Monde*, it could be argued that the 2 year probationary period under the proposed CPE was not a 'reasonable duration' and could therefore be in violation of ILO Convention no. 158 ('La Cour de cassation reconnaît l'application de la convention internationale du travail', *Le Monde* 31 March 2006.). If the Netherlands were to abolish the prior authorisation system, the employer would still need to take into account a notice period, if it would wish to adhere to international standards, particularly the ILO Convention no. 158.

44. Article 12 of the ILO Convention on the Termination of Employment.

3.11 Prior authorisation as a means to prevent termination to even be considered by the employer

So much for the empirical angle of the triangle. The question can still be posed: aren't these statistics unfavourably influenced by the fact that the prior authorisation indeed prevents employers to even try to terminate certain employment contracts? That would lead to termination cases not becoming actual cases in the statistics because the employers decides the better of it, and does not request approval of dissolution.

Let it be said, that in general it is very difficult to answer that question very accurately, as it is very difficult in general to investigate things that are not happening. But there are some relevant data available. For instance, the aforementioned research reports do not indicate that employers have difficulty in filing a request for approval or employment: only 10% of interviewed employers in the Research voor Beleid report saw the requirement for prior authorisation as a no-go to their wish for termination of an employment contract[45]. These research reports furthermore give the impression that employers choose the cantonal court proceedings when they have a difficult case, so that they at least have the odds on their side when it comes to dissolution and subsequent termination of the contract, albeit that they will then probably have to pay a severance.

More importantly, as I will elaborate on in the following part of this lecture, in most cases the prior authorisation does not help employees because it is circumvented, lawfully or not, by the employer, or simply, because the prior authorisation does not come into play at all.

4. A closer look at the material effect of prior authorisation

So let me get back to the question I posed earlier, which I will now work out in more detail. As noted, there is a triangular relationship between employment, contract and termination, and this relationship is characterised primarily by the principle that the weaker party of the employment contract, i.e. the worker, should be given some sort of protection[46]. The fact that this protection is much-needed can be

45. Research voor Beleid 2000, p. 51.
46. A book that entirely concentrates on all possible aspects of this theme is Ongelijkheidscompensatie als roode draad in het recht, liber amicorum dedicated to prof. Max G. Rood, Deventer 1997.

illustrated by three different categories of practical examples, in which categories one can simultaneously test the effect of the prior authorisation.

4.1 First category: loss of employment on account of employee's own acts

The first category concerns the situation where employees lose their employment as a result of their own doings or alleged wrongdoings. This category can be divided into three sub-categories.

The first one deals with the situation where an employee, on an individual basis, accepts or even initiates termination without in fact having a genuine desire to do so. The two decisions of the Dutch supreme court in the Ritico-case and the Van der Laan-case[47] clearly showed that by the end of the 1980s it was still not unusual for an employee to be forced by improper means to waive his rights and be dismissed in the process. The first case was the very banal bad movie situation of a woman who hardly spoke Dutch, yet was asked to sign her resignation letter by her employer. Regardless of the validity of the reasons of the employer to terminate the contract of Mrs. Ritico, it was clear that her resignation had to be revalidated. Yet no prior authorisation was needed in this case, because her unconscious voluntary resignation let to a situation where the employer could claim no authorisation of any nature was required any more.

Fortunately, Mrs. Ritico was saved by the supreme court that once again[48] confirmed the hard and fast rule that in case of an employee signing his own resignation, the employer must give sufficient evidence that the employee realised the extensive consequences of his resignation clearly and ambiguously. So here the prior authorisation system was no help at all Then there is one judgment in particular that stands out, if only for its colourful name: the *Je bekijkt het maar* judgment, which could be translated into something like the *See if I care!*-judgement. For those of us with less fanciful minds its official title of *Westhoff v. Spronsen*[49] may sound more familiar.

The case concerned a lorry driver who came back from a very tiring return drive to Turkey and when arriving at the business premises of his employer assumed that he would get a lift back home. This was not

47. HR 25.3.1994, JAR 1994/92; HR 8.4.1994, JAR 1994/95.
48. See also: HR 14.1.1983, NJ 1983, 457 (Hajziani/Van Woerden).
49. HR 12.9.1986, NJ 1987/267.

the case, which led to the lorry driver shouting out: 'I will grab my gear, see if I care!, I won't be coming back.'

The next two days nothing was heard from him, after which the employer sent him a registered letter, saying: 'Apparently you no longer wish to be employed by our company, which leads us to conclude that the employment has been terminated.'

Yet one day after the letter was sent the lorry driver reported back to the employer, who did not allow him on the premises because, as the employer claimed, the employment agreement had been terminated by mutual consent.

The lorry driver claimed that his employer had not met his obligation to investigate whether the lorry driver really had wanted to resign. This was in vain however.. The supreme court ruled that the position of the lorry driver entailed that he could be expected to realise the consequences of his statements and acts. The supreme court further ruled that the employer in this case had no obligations to investigate the driver's intentions, having given the driver some days to retract his statement. But the supreme court did not refer to the fact that the lorry driver had had two days off in any event, so that he in fact returned on the first next working day.

Now, I will not raise the question in this lecture hall, how many judges in the past have had momentary outbursts in the workplace, *without* losing their job – many a practising litigation lawyer could be my witness there. My key comment here is that this case of *See if I care*, would have been an ideal situation where a prior authorisation system indeed might have worked, to calm down parties before a cantonal court for instance, and bring the situation forward, either to a return to work of Mr Westhoff, or to a reasonable severance payment – but because the employer claimed that the employment contract had ended by mutual consent, no prior authorisation was necessary.

When we look at the three cases of Ritico, Van der Laan and Westhoff v. Spronsen, it is noteworthy that they all dealt with very distressing situations for the employees in question, however the prior authorisation system did not offer any meaningful contribution. In fact, it was nowhere to be found. The workers concerned in the end depended on the goodwill of the Dutch supreme court, which is eminent in its development of the legal system in the Netherlands, but it has quite a capricious way of dealing with the facts.

A second subcategory of situations in which employees lose their employment as a result of their own doings or alleged wrongdoings deals with the delicate balance in dismissals for urgent cause. As a new testament for the next millennium the Dutch supreme court ruled on 21 January 2000 in a case of a dismissal for urgent cause, that the

question whether such urgent cause existed had to be judged not only by the doings, the qualifications and the behaviour of the employee, but more in general by *all circumstances relating to the case in question.*

This case was about an assistant shop manager of the HEMA, a chain of stores that my American colleagues would certainly refer to as *'so polder'*. He was made redundant after nearly forty years of continuous service of the HEMA. He was to receive a modest redundancy payment, and was also forced to take his last two weeks off as a vacation. On his last day at work he had his goodbye drinks with his colleagues, in a room behind the store, at the end of which he walked out and left and took with him out of the store two bottles of motor oil, worth five guilders each. He was caught by security, and after a brief suspension was dismissed for urgent cause.

Now most of the learned partners in my law firm, who have sought more intellectually challenging fields of the law, as they say, have always painstakingly pointed out to me that labour law is not exactly as complicated as rocket-science. Not being a rocket scientist I always fail in convincing them of the opposite, but the district court that decided on the HEMA-case fortunately proved them wrong. The district court apparently failed to grasp what was clear to every self-respecting labour lawyer, namely that even though the assistant shop manager's actions formally qualified as theft, the theft in this case provided insufficient grounds for a dismissal for urgent cause, considering all the circumstances. Fortunately, this time the supreme court was there to correct the injustice done.

Again, there was nowhere a prior authorisation in sight. The assistant shop keeper had to fight for his right all the way to the supreme court, which gave its first decision four and a half year after the event took place.

Furthermore, note that this case had a sequel with the supreme court in December 2003, and was not finalised until 2004, almost ten years after it all happened. [50]

I assume that nobody will dispute that in cases like these an employee should have adequate protection, if only against himself. But the present prior authorisation system did not provide any protection at all in this case, not mentioning the fact that due to lack of a swift court procedure to establish the rights of the assistant shopkeeper, he was forced to engage in court battles for almost ten years.

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50. HR 21.1.2000, JAR 2000/45, HEMA I; HR 19.2.2003, JAR 2004/14, HEMA II.

Then there is a third subcategory of the employee accepting his resignation on the basis of incorrect information. Case law shows that it happens regularly that employees are not informed, or not informed sufficiently, about their rights to unemployment benefits, or even their pension rights.[51]

Again, it goes without saying that an employee needs adequate protection against decisions taken on the basis of incorrect information, but in this case also the requirement of prior authorisation does not contribute anything to the solution. It is often not until much later that the employee discovers that his financial position, in terms of unemployment benefits or pension, is much worse than explained to him by his employer. By the time the employee finds out that he based his agreement to the termination of the employment on incorrect information, the point of prior authorisation has long passed, and it may prove to be very difficult to get a reversal of the authorisation. The employee may claim damages from his employer, but he has given away his opportunity to oppose the employer's request for termination.

4.2 The second category: the collective dismissal

A second category regards the individual and collective redundancies. Let us first take the subcategory of collective redundancies. These can be based on commercial reasons or as part of a more general reorganisation. In both cases, a prior authorisation seems unnecessary at first glance because in the Netherlands, as in all EU countries due to the Council Directive on collective redundancies[52], labour unions must be involved in the process of collective dismissals. In addition, in the Netherlands the works councils must be asked for advice if the company has more than 50 workers.

Here, the union(s) and the employer, as a result of article 2.1 from the Council Directive on collective redundancies, conclude a social plan which lays out which employees, in which positions, may be dismissed. As the Council Directive prescribes, the employer and the unions involved should try to find ways and means to avoid collective redundancies and mitigate their consequences as much as possible.

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51. Amongst others: HR 19.9.2003, JAR 2003/244; provisional judge of the district court of Rotterdam 23.8.2002, JAR 2002/218; cantonal court Eindhoven 20.5.2003, JAR 2003/172.
52. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, O 1998, L 225/16.

And if there are no unions represented in the company of the employer, other platforms of workers representation could be involved on the basis of the Council Directive. In a social plan, redundancy schemes are set up to provide financial compensation, outplacement and training allowances, all paid for by the employer. In a considerable number of cases these social plans even contain a commitment of the employer not to dismiss more staff than foreseen in the ongoing redundancy process during a certain period.

Indeed, the Council Directive on collective redundancies also provides for notification to the competent public authority of the projected collective redundancy. In the Netherlands, this has taken the shape of a notification to the CWI. However, prior authorisation proceedings through either the CWI or cantonal court are still being applicable even to a collective redundancy where unions have negotiated a social plan – which seems odd, because the CWI does not materially test these Social Plans.

It is my opinion that the quasi-role of granting prior authorisation as played by the CWI or mutatis mutandis the cantonal court does not have any added value in collective redundancies, which I can explain as follows.

To make a proper assessment of the commercial or organisational reasons presented for the dismissal desired by the employer, a good, adequate and up-to-date level of knowledge about the business of the employer as well as the line of industry in which it operates, is indispensable. A presentation to the CWI of auditor statements showing how poorly the company has performed in the past period or how well it could perform if certain changes were carried through, add weight to the request for a collective dismissal, but they definitely do not constitute sufficient justification to claim that the proposed social plan is adequate. For that conclusion to be reached, not only elaborate discussions are needed about the developments within the company, its line of business and its viability, but also: a detailed inspection of the various components of the social plan, such as the financial arrangements as well as other arrangements, for instance for training, and, less important: arrangements for internal applications following the reorganisation for a new position or a position at another division of the company.

Only the established trade unions, as is my continued opinion, are able to do this properly, not only because the unions have adequate support as an organisation, but also because they have sufficient authority and support to act independently vis-à-vis the employer. Added to that,

trade unions have professional negotiators with sufficient commercial knowledge – and not less important – sufficient self-conscience to know when their own understanding of certain matters is such that the advice of others should be sought.

Especially in collective redundancies, on the labour side, all power is collective power[53]. Quite so the Council Directive on collective redundancies points at the unions to be the negotiating partner of the employer intending to downsize his staff. Let us not forget that negotiating a social plan is nothing but collective bargaining, one of the primary tasks and tools of the union. One could even argue that the role of the government-run CWI being in the position to judge an agreement between social partners on a subject within the field of collective bargaining is at odds with ILO Convention no. 98 on the right to organise and the right of collective bargaining.

One last important related aspect is that negotiators of the labour unions are independent from the company and the interests that play a part in the process. As an aside, this also serves to indicate that I disapprove of works councils getting involved in the preparation of a social plan in any other role than an advisory one: let us never forget that members of works councils are too much involved in the business of the employer to be able to remain fully independent in situations of collective redundancy.

In short, I believe that trade unions are simply much better equipped than the CWI or the courts to negotiate a social plan at micro level and in detail which may result in (possible) collective dismissal.

However sometimes a court apparently feels the CWI should be the instance to sanction a collective redundancy including a social plan agreed upon between employer and unions. judge if all requirements of the EU Directive on collective redundancies. This view is reflected for instance in a rather confessional judgment by Kantonrechter Leeuwarden[54] who ruled that the CWI is better equipped than the court to assess the merits and consequences of an intended collective redundancy so that, still according to the Kantonrechter Leeuwarden, the court should be reticent in passing judgment on dissolution requests in relation to a collective redundancy.

53. O. Kahn-Freund, Labour law, old traditions and new developments, Toronto 1968.
54. Kantonrechter Leeuwarden 28.09.2005, JAR 2005/259.

I must admit that I am puzzled by rulings such as these. Not only does article 7:685 Dutch Civil Code clearly instruct the cantonal judges to make up their own discretionary mind on whether or not dissolution of the contract is justified under the circumstances, but also, taking a closer look at the EU Directive, it should be clear that it does not purport to confer more authority on the CWI in a collective redundancy than a court of law; rather, it merely instructs employers to negotiate a sufficient plan with the unions.

And let us not forget that the Dutch Supreme Court has repeatedly decided[55] that the authority of the courts to decide purely discretionary on a request for dissolution cannot in anyway be excluded or limited, be it by contract or in any other way, which means that no cantonal judge may ever hide behind the CWI, even if a request for approval has been filed with the CWI by the employer. This means that in my view the cantonal court must simply test whether an agreement was made between employer and unions, which provides for an adequate social plan. The cantonal court judges acknowledge this explicitly in relation to the issue of severance pay, now that the so-called Recommendations of the circle of cantonal court judges, describing in detail the rules of the cantonal court formula in the Netherlands, contain a provision stating a social plan that has been agreed between employer and unions should only be reviewed in terms of reasonableness[56].

And still, there is no evidence that the CWI is adequately equipped to properly assess the need for a collective redundancy and the balance of the subsequent social plan. The CWI, incidentally, only issues permits for collective dismissals if the unions are notified properly and on time and are involved adequately by means of consultations and negotiations, as provided for in the EU Directive on collective redundancies.

So in the case of a collective redundancy, prior authorisation does not contribute anything meaningful.

This can hardly be surprising at all to the EU legislator if we look again at the one role assigned to the authorities in the Council Directive on collective redundancies. As I have quoted before, the

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55. See i.a. HR 25.2.1994, NJ 1994, 377 (Inhopro/Schoenmaker); HR 2.04.2004, JAR 2004/211 (Drankencentrale/Blakborn).
56. Aanbevelingen van de Kring van kantonrechters of 8 november 1996, last amended on 8 October 1999, Recommendation 3.6, publ. In Tekst & Commentaar, Deventer 2004, p. 776.

Directive only requires notification of the authorities so as to enable the competent public authority '*....to seek solutions to the problems raised by the projected collective redundancy*'.[57] It goes without saying that 'seeking solutions' is something entirely different from prior authorisation.[58]

Here the unions play or should play a pivotal role as the serious and critical counterparty of the employer.

However, case law shows that sometimes a social plan is concluded by a trade union that cannot be considered representative within the company or within the group of workers it was supposed to represent.[59] So the question can be raised whether a prior authorisation, either by the CWI or the cantonal court, would not be sensible if the social plan is agreed upon between an employer and a non-representative union?

The answer is negative. The fact that an intended collective dismissal is arranged with a non-representative union is not something which should be applauded, but this does not imply that the CWI and/or the court could suddenly form a well-informed opinion at micro-economic level of all the aspects of the intended collective dismissal. As I have pointed out above, independent and strong unions have expertise, know the sector and perhaps also this employers business within the sector, and even if they do not have large membership within the employers workforce, they still would know more of the 'way-of-the-world' in collective bargaining with the employer on the consequences of a collective redundancy than a court..

Besides, I find the shifting of the role that workers representatives should play as counterpart of the employee to the CWI or cantonal court judges an outright violation of the principles of the Council Directive on collective redundancies.

Then there is still the case of an individual redundancy without trade unions coming into play, which in fact is any redundancy where the number of workers that are made redundant fall under the minimum requirement of the Council Directive on collective redundancies. Also in those cases I doubt very much whether the CWI or cantonal court

57. EU Directive 98/59 of 20 July 1998, *Eurlex* 31998L0059.
58. The ILO Convention on the Termination of Employment does not even go that far; it merely imposes the obligation on the employer to inform the competent authorities that a collective redundancy is contemplated (Article 14).
59. See Rb. Amsterdam 29 december 2005, KG 2005, 2426, as discussed by: R.A.A. Duk Ondernemingsrecht 2006, 3, p. 38.

are sufficiently well-equipped to judge the truth and true need that is presented to them by the employer. Not rarely, individual redundancy is used as a means to justify the wish to terminate the contract of an employee who for whatever reason has fallen from grace with his employer. Individual redundancy is then used as an excuse to save on severance pay, so that the system of prior authorisation in fact ends up having an adverse effect for the employee

All in all, prior authorisation does not and cannot act as a safeguard that a fair social plan is prepared in the case of an intended collective redundancy. The prior authorisation system has no added value whatsoever for an intended collective dismissal where a social plan on labour conditions for the dismissed workers was agreed with the unions. The only difference is the delay caused by the assessment procedure by the CWI, which can adversely affect the company's commercial or organisational situation. In these cases prior authorisation may have as its only result that *Verelendung* occurs. By *Verelendung* I mean the self-inflicted downward spiral, others might say: the negative of the Von Munchhausen-effect.

If the Dutch social partners are sincere in a shared wish to ban the situation where non-representative unions are used to circumvent the rights of workers in the case of collective redundancies, modernisation of the legislation on collective bargaining agreements is the easy way out, as I have suggested more than once[60].

I make one last aside on this subject of collective redundancies. It is notable that so seldom the redundant employees share in any of the future profit that comes from their redundancy.

Workers often have to leave the company so that in the future more profit potential can be generated for the company and the remaining workers. What these workers actually are told is nothing more or less than: you must leave because you are a loss item.

It has always struck me that so few social plans provide that employees who are forced to leave should receive some kind of compensation that can be regarded as a participation in the future realised profits of the company. In addition to the compensation paid out to them under the social plan, which is often very little when

60. See inter alia F.B.J. Grapperhaus, Dispensatie van Algemeen verbindend verklaarde CAO's, in: SMA ed. 2006, nr. 5.

compared to the money paid out under the cantonal court formula, why they do not receive a fair share in the future wealth of the company?

So far we have seen two categories of cases where it seems that prior authorisation is given either too late or it misses its objective in those cases where the employee has waived his rights and wants to retract that, or in those cases where the employee is dismissed instantly by the employer, or whose performance is otherwise judged too harshly by the employer.

Let us take a more detailed look at two cases where prior authorisation might possibly be useful.

4.3 The third category: the unbridgeable gap in the working relationship

This category is all about cases relating to employees whose dismissal is wanted by the employer, but where there is still employment *and* a contract and where the facts could be labelled as debatable: should this employee be dismissed, indeed should it be *this* employee who should be fired, who can be blamed for the unpleasant atmosphere, or are his colleagues to blame? Is it true that this worker achieved poor results in his sales area, or are there external circumstances to blame for this?

Here, at face value one would assume prior authorisation could be helpful as it allows the independent government agency CWI, or the court, to assess whether the employer does in fact have sufficient grounds for the dismissal. The same applies, mutatis mutandis, to the case of a breach of trust. The relationship at work between the employer and the employee has turned sour: something one often finds in the situation where management policies are questioned by only one employee, which, interestingly, happens particularly often in cases where those policies were actually unsuccessful. In this case too, a prior authorisation could be useful.

Now let us take a closer look at the two main subcategories of situations of an irredeemable breach in the working relationship.

Sub-category no. 1: the poorly performing employee

First, the case of the poorly performing employee. It has become clear that the way this employee fulfils his job is unsatisfactory; the employer has raised the issue a number of times and maybe the employee has even turned down opportunities to improve his performance, like additional training – or if he took the opportunity, the training was to no avail.

At a certain stage, the employer decides that enough is enough and he wants to terminate the employment. This is not possible just like that, since the termination will first have to be assessed by the CWI or a court. Often, parties will start negotiations, which may often lead to a final settlement of the employment, but for those cases no prior authorisation is necessary. Only in a limited number of cases does it happen that the parties fail to reach agreement, so that the employment will continue until either the CWI or else the court has decided whether the employer may terminate the employment. Meanwhile, back at the workplace things deteriorate., the employee is put on paid leave at a certain stage and finally the employer will refuse to give a positive reference on behalf of the employee, thus drastically reducing his opportunities on the labour market. Depending on the quality of the legal assistance retained by the parties and the assessment and personal preferences of the individual judge, compensation will be awarded that can be high or low. And to make this all even more arbitrary; if the employer decides to apply for a dismissal permit with the CWI and the permit is granted, the employee even receives no additional payment whatsoever. He will have to start proceedings that can last up to a year to receive a fair compensation. The end result here is that prior authorisation by the CWI has only brought him out of the frying pan into the fire: the employer has a permit and thus an alibi to dismiss the employee, while the employee is left without compensation of any sort, for the time being.

To those who are of the opinion that there should be cases where it is imaginable that the employer does not have sufficient grounds for termination, which would then mean the CWI should refuse approval, I would like to refer again to the statistic I showed earlier, which even after taking the so-called formal proceedings out, indicates that the employer has a 81,25% chance of obtaining approval with the CWI.

Of course, in the case of an unsatisfactory performance of the employee, the employer may also choose to request the court for dissolution of the employment. The employee has one great advantage here: as we have seen the court can in its decision to dissolve the contract simultaneously award a severance payment to the employee. But practice shows that the court will dissolve the contract anyhow because of the strained relationship between the parties.

Even if in those cases the court awards compensation, prior authorisation as such has only little independent meaning. On the basis of the available research material presented earlier, one may safely assume that the success rate on obtaining the dissolution with

cantonal courts lies at least above 94,25%. It happens only rarely that a court refuses to dissolve an employment agreement.

A closer look at published case law, mentioned in the research statistics of Loonstra/Kruit, shows that this only occurs in very extreme cases. Either the employee has almost no prospect of finding employment elsewhere and the present employer has hardly made an effort to heal the relationship, or the events have not created a true relationship meltdown between employer and employee.

Once in a while we come across a truly clear example of how things perhaps should go, if prior authorisation were really instrumental to the system of protection.

The case I want to describe here concerns a very recent cantonal court decision that was not published when my lecture went to print, but which could already be found on the internet.[61] In this case the employee had been with her employer for almost fifteen years. As a noteworthy aside, I add that the employer in question was a legal assistance insurance company and the employee was one of the company doctors, who had suffered a setback in her health situation in 2003 because of her ever-increasing workload. There were no signs from the employer of an unsatisfactory performance until halfway[62] through 2004. The employee in question started to have problems at work when trying to cope with her workload and, perhaps more significantly, she had to deal with a new manager at the company who at the time was introducing new working methods. The employer refused the employee's request for mediation. To the contrary, it followed the rules of the manual for beginners: sending warning letters to the employee, refusing to talk about the employee's complaints about her workload, and finally putting her on paid leave – which the employee refused to accept.

The cantonal court refused the employer's request for dissolution of the contract. The court ruled that the employer had violated the principle of reticence towards middle-aged and older employees who show signs of experiencing difficulties in performing their duties as a result of changes in the workplace.

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61. Das Nederlandse Rechtsbijstand Verzekeringsmaatschappij vs. Straat, Rechtbank Amsterdam, sector kanton (District Court of Amsterdam, cantonal court division), 12.7.2006, EA-06-2546, published on www.rechtspraak.nl.
62. As we find in Kantonrechter Alphen aan den Rijn 5.07.2005, JAR 2005/254.

In my view, the cantonal court in this case applied a species of the general rule that prior authorisation should be refused by the CWI and/or the court if the employer has not made a reasonable effort to ensure the employee's employability in the workplace.[63]

Had the employer made such effort, then in my view there would have been no reason for refusing prior authorisation against all odds, and the employment contract then ought to have been terminated – this would be without prejudice to the severance payment, because even if the employer had done all it could to try to keep the employee at the workplace, that would be irrelevant to the question whether or not he should pay severance to the employee.

But there is a certain relation to the loss of employability and severance. The longer the period the employee has not performed and the more opportunities he has been given to perform, the more reason the employer has to seek termination with a lower severance payment.[64] What we see here is another example of *Verelendung*, the downward spiral.

In many situations a lack of efforts by the employer to enhance employability does not result in a refusal by the court to dissolve the contract, but in a higher severance being awarded to the employee, as case law on the subject shows.[65] And the less the employer has made a serious effort to keep the employee employable, the higher the severance will be, should the court rule that continuation of employment is not an option.[66]

The amount of confusion we are all experiencing in the legal world on this subject of employability is illustrated rather unfortunately by two court decisions last year[67] in which the seniority rules (*anciënniteits-beginsel*) were set aside by the court to dissolve the employment contracts of workers with more seniority rights than their colleagues,

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63. Similar decisions may be found in: Kantonrechter Amsterdam 14.04.2005, Prg. 2005/88; Kantonrechter Eindhoven 3.06.2005, JAR 2005/223.
64. As is demonstrated in: Kantonrechter Rotterdam 4.01.2005, JAR 2005/40, on the subject of an employee who had repeated performance issues due to his problems with alcohol and who was given a string of new opportunities by his employer over a period of at least eight years.
65. As in Hof 's-Gravenhage 8.04.2005, JAR 2005/169; Hof 's-Gravenhage 13.05.2005, JAR 2005/148; Kantonrechter Alphen aan den Rijn 5.07.2005, JAR 2005/254.
66. A very clear example of which can be found in Kantonrechter Groningen 20.01.2005, RAR 2005, 69.
67. Kantonrechter Haarlem 5.11.2004, JAR 2005/56; Kantonrechter Nijmegen 3.3.2005, JAR 2005/163.

as these workers, taking into account the troublesome financial situation of their employer, were less versatile, which in my book means: *less employable*, than their younger colleagues.

In one of these two cases the Cantonal Judge (*Kantonrechter*) Nijmegen even considered that '…it is not possible to establish whether the employer or the employee is to be held responsible…' for the employee's total lack of versatility, or should I say: employability. As an aside; to the credit of the cantonal judge I should add that he did the right thing by awarding the nominal severance to the employee.

I will explore the concept of employability later, but first we should study the second subcategory of the gap in the unbridgeable working relationship.

Sub-category no. 2: the dead-end working relationship

The second subcategory concerns the situation of a dead-end situation in the working relationship between the employer and the employee without either party having any particular blame for the situation. Here, the following scenario often unfolds. The employer indicates towards the employee that in his opinion they have reached a dead-end in their professional relationship and that this situation cannot continue.

Now if parties agree to the termination with mutual consent, with or without a fair and reasonable severance being paid, they do not need any prior authorisation, so neither the CWI nor the court has any functional role.

The situation is different, of course,when parties cannot agree on the conditions of termination. Because of the requirement for prior authorisation, if parties cannot reach agreement, they cannot just go their own way. One of the two will have to terminate the agreement, but the employer can only do so if the CWI has issued a dismissal permit, or the court has ruled on a dissolution upon request by the employer or the employee.

A request for dissolution, by the way, is not a course of action embarked on lightly by the employee, as it may result in the surrendering of certain of his legal rights.

Employees who too easily seek dissolution of employment contracts through the courts, often accompanied by a request for a fair and reasonable compensation, are even in the recommendations of the cantonal courts labelled as 'fortune hunters' (*'gelukszoekers'*)[68]. This

68. As the Aanbevelingen define him/her: '…who without any urge following from the employment contract [I assume the Cantonal court judges here means the relation-

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may lead to the employee not taking any initiative to ask for a dissolution of the employment contract.

On the other hand; the employer, too, may not want to take the initiative because he may end up having to pay severance, a risk he will not willingly take.

As long as this deadlock continues, the relationship between the parties will only deteriorate. It is not uncommon that after a while the employee will call in sick. From then on, the only available option is dissolution via a court. The advantage of this option is that the level of compensation is determined at the same time as the contract is dissolved, but again: the only value of prior authorisation here lies in the fact that the amount of the severance payment will be set.

One must keep in mind that, should one of the parties have the courage to request for a dissolution, it is certain that the court will dissolve the contract without further delay, because as we have seen, the starting point was that in the view of both parties their working relationship had come to a dead-end. So again, we see that prior authorisation does not add to the solution, it only adds to the problem.

4.4 Prior authorisation means by definition Verelendung

The concept of prior authorisation was originally intended as an instrument to control and manage the labour market, so it is hardly surprising that it doesn't have an impressive track record in the area of preventing light dismissals, a purpose that was only introduced in later days. What we see is that prior authorisation comes to the rescue after the storm in cases where the employment, validly or not, has ended either by itself or else at least with the help of the employee.

And in cases of collective redundancies it is not prior authorisation that can safeguard the rights of those workers who may lose their job, but it is the unions who can and should play a decisive role; in such cases, prior authorisation only means loss of time and thus deterioration of the financial situation of the company that is already facing rough times. Finally in situations where there is indeed a

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ship, not so much the contract – FG] itself requests for dissolution, for instance just before accepting a new job, with the aim to get a severance…': This is not the time and place to dissect the Aanbevelingen, those very majestic, seemingly untouchable rules set by the Circle of cantonal judges; still I think that the example of a worker on the verge of accepting another job is not the right one; the fact that the worker has decided to look for a job elsewhere is not of much relevance in a case where, again 'for instance', the employer made his working life impossible.

possible unbridgeable gap in the working relationship, we have seen that prior authorisation does not help. In the end, the approval or dissolution is almost always granted, and here too, prior authorisation only leads to a *Verelendung* in the situation.

So are there any positive side effects for employers or employees that could justify the system of prior authorisation? On the contrary, as pointed out before.

Prior authorisation is relatively expensive for employers, because it takes an unnecessary amount of time while it does not add anything useful in any form to the employability or the severance rights of the employee in question.[69] Then: prior authorisation carries great injustice for the employee who is terminated with the approval of the CWI as he will still have to start separate lengthy court proceedings to get a severance payment, whereas the employee who is terminated through a dissolution by the court will know by that same decision exactly the composition of his severance package. Another injustice relates to workers who have worked for up to three years on the basis of fixed-term contracts and can be dismissed without any prior authorisation, nor with any reasonable package.

As for my criticism at the *Verelendungs*-effect of the prior authorisation system, anyone can see that it is truly a very, very ineffective means of employment protection.

Someone who disagrees with my view might stand up and point at the fact that there are still at least some cases in which prior approval is denied by the CWI, or the dissolution request is rejected by the court, so a happy ending seems to shine at the end of that individual rainbow. Here another disappointment may follow when we study the results of two different research reports which both show that in many cases where prior authorisation was not granted by the CWI or the court, in the end the employee had left the company one way or the other within a year after the original proceedings had ended.[70]

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69. An interesting calculative exercise was done by G.C. Scholtens in 'Herziening ontslagrecht: kosten en keuzen', Sociaal recht, Ed. 2005, no. 2, however one should be aware that his thesis is not supported by extensive empirical research.
70. R. Knegt/A.C.J.M. Wilthagen, Toetsing van ontslag, Groningen 1988; Research voor Beleid 2000, p. 176; I should note that Research voor Beleid 2000 does not explicitly mention the one-year-period, but it seems that such a term is referred to by the interviewees, as it would not make sense if their answer to the question whether the employees stayed or left in the end would have an open ending in time.
71. J.H.M. Van Erp, Contract als rechtsbetrekking, dissertation University Brabant, Tilburg, Zwolle 1990, p. 291-292.

So the question that inevitably spring to mind is: why do we bother with this thing called prior authorisation? It is time to try and answer the most fateful question of all in the polder landscape of employment relations.

5. The End of the Affair

5.1 Introduction

Employment is not only about a contract between parties. Like any relation between two parties, employment is also influenced and to some extent even governed by other duties and obligations for each of the two parties: both duties between the parties as well as duties to third parties in or sometimes even outside the workplace. When still at the early stages of writing my dissertation in the first half of the nineties I found Van Erp's general description of a legal relationship (*rechtsbetrekking*)[71] a very fitting description of the employment relationship. Following Van Erp I qualified employment as a dynamic relation between two participants in a defined sub-community, developing in time and circumstances.[72] Neither of us could foresee that the Dutch supreme court already would define it in more or less similar wording some years later.[73]

Apart from the dynamics that parties cause among each other they must take into account the dynamics as well as the status quo of the workplace, i.e. the institutional theory.[74]

The institutional theory takes as its starting point that the workplace should be seen as a community in which rights and obligations between the employer and the individual employee cannot be seen separately from their place in the working community of the employer's business. So what happens from a factual as well as a legal perspective between employer and employee is largely influenced by

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72. F.B.J. Grapperhaus, Werknemersconcurrentie. Beperkingen aan concurrerende activiteiten van de ex-werknemer ten opzichte van zijn voormalig werkgever, dissertation, University of Amsterdam, 7 december 1995, Deventer 1995, p. 28.
73. HR 14.11.1997, JAR 1997/263 (Groen/Schoevers); later even more elaborate in HR 10.12.2004, JAR 2005/15 (Diosynth/Groot).
74. On the occasion of the discussion about HR 26.06.1998, JAR 1998/199 (Taxi Hofman/van der Lely), an extensive overview of the various positions in Dutch literature on the subject was given by W.A. Zondag, in his publication: Institutioneel arbeidsrecht, RM Themis, ed. 2002, no.1, p. 4 etc.

what happens within that working community and the people participating in it. This requires a delicate balance of all the interests involved. One should note, of course, that the institutional theory does not so much provide us with the solution how to deal with these dynamics in the workplace, but only tries to find an explanation why the contract between employer and employee cannot be approached as a purely binary phenomenon, as Van Slooten rightly puts it.[75] One example of the fact that the relationship between employer and employee is not merely binary can be found in the rules that apply in a collective redundancy situation to the question of who should be selected first for redundancy: this does not entirely depend on the personal circumstances of the individual employee but is also largely influenced by the composition of his peer group at work, principles of seniority, age and education requirements.

Another example, showing the flip side of the coin, can be found in the Dutch Supreme Court decision of 26 October 2001[76]. The case dealt with an employee whose work consisted of lifting and then weighing bags of animal food before sealing them for shipment. Due to persistent back problems, developed at work, the employee was no longer able to lift the heavier bags of which a small quantity had to be made ready for shipment every hour. The supreme court then ruled that where the employee claimed that the weighing and lifting of the heavy bags only happened very sporadically, it could fall within the employer's duty to set up a scheme to ensure that colleagues would step in every hour to help him lift the heavier bags to the scales. This example again shows us how a working community could work – although the story does not explain what happened in the end to the backs and spines of the colleagues concerned.

The legal relationship between employer and employee thus is not a one-to-one between the two. Whether or not termination of the employment contract is objectively justified does not depend solely on the situation between employer and employee, it also depends on many other factors in the workplace.

But even between themselves, employer and employee have to deal with much more than merely contractual rights and obligations. They have a mutual relationship that is also governed by legal requirements

75. J.van Slooten, De derde in het sociaal recht, inaugural lecture, University of Amsterdam of 18 march 2005, publ. UvA Amsterdam, p. 16-18.
76. HR 26.10.2001, JAR 2001/238 (Bons/Razijn).

on health and safety, equal treatment, fair opportunities and fundamental rights, ranging from the employer's right to confidentiality of company know-how and property rights to the employee's rights to privacy and freedom of speech.

Then there is still a clear distinction in a legal relationship/contractual relationship between the contract and the relationship itself. The strange phenomenon occurs that a relationship can be terminated while the contract still continues. When the relationship has ended, it is quite possible that the contract still has to be terminated. Until that moment contractual obligations will have to be met. To terminate a contract, certain requirements must be fulfilled depending on the type of contract and the legal system it is embedded in.

The relationship *itself,* however, does not provide for any requirements for termination. The end of a relationship means there is no longer an ongoing relation. Whether there is anything left to be dealt with between the parties, notwithstanding the end of their relationship, depends on its nature and also on the contract that was drawn up around it, as well as the circumstances under which the relationship came into existence and was terminated. The more permanent an ongoing relationship has been, the more necessary, or at least the more advisable, it becomes to work out certain aspects of the relationship in a contractual form.

Although true that at the end of the relationship the contract itself will still have to be rounded off, this does not alter the situation that the contract of employment is an accessory to the relationship. It is built completely around the existence of the relationship as a framework of agreed components within the relationship. The contract has no independent purpose without the underlying relationship. When the relationship ends, the contract must take this end as a starting point for the 'chronicle of a death foretold', to quote Gabriel Garcia Marquez.

Maybe a short detour into the history of the legal system will help us out here.

Until the late twentieth century, marital relationships entered into in most countries, and certainly the Netherlands could only be annulled by one of the marital parties through judicial proceedings, provided there was a serious justification, such as adultery. However, in many cases, one party simply wanted a divorce because that party felt that the marital relationship was exhausted. To achieve a divorce, that party had to either claim or admit to pretence adultery. In the last

decades before the law was finally amended, this practice of 'pretence adultery' became known as 'the big lie'. The marriage contract was conceived at a time when the underlying relationship and the unity of love had another meaning and interpretation; that underlying relationship required a contractual arrangement that bound the parties closely together – 'till death do us part'. However, this contract was not entirely appropriate for the new developments taking place in the underlying relationship. This led to a situation in which the contract continued to exist independently of the relationship it was intended to govern, so much so that a bogus construction was necessary to achieve the end of the contract when the underlying relationship was already completely meaningless[77].

5.2 The end of the affair as the heart of the matter

Here we get to the heart of the matter, which is: the end of the affair. The end of the affair is the point where one party or perhaps both parties are determined not to go ahead with the other. One may doubt if at that stage a forced upholding of the underlying contract will bring back the will to continue the affair. In employment this is in no way different from in a relationship of a different nature. Employment is a relation between employer and employee. And employment relates in a ménage à trois with contract and termination.

If the employment relationship loses its meaning, it is not realistic to try and avoid termination – as shown by the statistics of the CWI and the cantonal court –, and perhaps is also shown by the many employees who according to research left within a year after their employer was refused prior authorisation for termination.

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77 This comparison occurred to me while working on this public lecture. The metaphor of the 'big lie' has been used before by R.M. Beltzer in relation to the formal court proceedings: R.M. Beltzer, 'Over een opmerkelijk WW-plan', *SMA* 2005, 2, p. 59-60. However, I find the metaphor less appropriate to formal court proceedings because these proceedings relate to a lie of two parties to mislead a third party, i.e. the body implementing the employee insurance schemes (UWV). The matrimonial big lie is created to provide a false justification in order to achieve a termination of a contractual relationship where the relationship itself is – in the view of one party – already exhausted. The prior authorisation is in fact an unavoidable false justification to be able to terminate a contract, in the case where one party already feels the relationship is over or exhausted.

So also from this angle we may safely conclude that it is highly questionable whether adequate protection for workers against loss of employment and employment opportunities is to be found in implementing some sort of authoritative customs system at the terminus of the employment relationship.

5.3 A civil law point of view at the end of the affair

Let me first look at the concept of the end of the affair from a theoretical civil law perspective. As I have explained, the contract is instrumental to the relationship between parties in any sub-community, e.g. employer and employee. In no category of contractual relationships one would argue that the end of the relationship can be postponed by a mere continuation of the contract. If the relationship, the affair that started it all, is over, we must ask ourselves what that means to the contractual and other rights and obligations the parties in that affair have or may have expected.

It goes without saying that unlawful termination of the relationship may lead to contractual liability, for instance a termination that does not follow the contractual rights and obligations of any of the parties. But unlawful or not, it is the end of the affair if one of two parties calls it a day – irrevocably and unambiguously. The continuation of ordinary contractual duties and revenues is replaced by the rules that apply to termination.

If this were different, millions of people would still be stuck together today, just because at some point in the past the other party was not willing to accept that the other qualified their relationship as finished.

But also if a contract is terminated lawfully, the terminating party is not simply released from any and all obligations towards the terminated party, notwithstanding a contractual provision that makes it possible to terminate without any obligation to compensate the terminated party. To understand that, we have to go back a little further, to Aristotle, who said:

> '… in associations for exchange this sort of justice does hold men together – reciprocity in accordance with a proportion and not on the basis of precisely equal return'.[78]

78. Aristotle, Nicomachean Ethics, Vv. (1132b).

This concept has been repeated by Pufendorf[79], who wrote:

> 'A requirement of all onerous contracts is that equality should prevail in them, or that both contracting parties receive equal benefit. Where inequality occurs, a right arises for the party which has received less to claim that his loss be made good, or simply to terminate the contract.'

From this, Nieuwenhuis[80] derived the concept of equal exchange, or, to put it in proper English, *quid pro quo*. This concept means that for every contractual performance by one party to another in a contractual relationship, there must be a reasonable counterperformance from the other party – which by the way is not the same as a iustum pretium.

Nieuwenhuis argues convincingly that[81], as there is no autonomous criterion for what equal exchange would imply, equal exchange is the outcome of a balanced and fair negotiation and contracting mechanism.

This concept applies not only to the contract but also to the termination of a contract. Termination requires equal negotiating positions.

Termination is only equitable if two conditions are fulfilled. First, there have to be even negotiating positions. Secondly, the end result must be an adequate quid pro quo, by means of adequate compensation for the loss each party suffers in the terminated contract, taking into account, of course, who was responsible for the events and circumstances that led to the termination. This is the case in any form of partnership, as well as in any form of continuing performance contract as we can see from actual case law by the Dutch Supreme Court.

Therefore, if a relationship is terminated lawfully, that is: in accordance with the rules that parties agreed upon contractually in their relationship, then the terminating party may still be liable for certain consequences if the other party suffers from the duly and

79. Samuel Pufendorf, 'On the Duty of Men and Citizen According to Natural Law', 1673, edition Cambridge University Press 1991.
80. J.H. Nieuwenhuis, Drie beginselen van contractenrecht, dissertation University of Leyden 1979, Deventer 1979.
81. Nieuwenhuis l.c. p. 58.

timely termination.[82] This is one typical consequence of the fact that the legal relationship between parties can extend beyond the limits of their contract.

Every permanent relationship implies an investment in its continuation and thus in future expectations. That is not an investment that can be written off. In fact, an investment that can be written off implies a limited duration, while a permanent investment assumes that the value is to be found in the continuation itself.

The cases that came before the Dutch supreme court dealt with distributors of large international brand names. Both the Dutch distributor of Mattel as well as the importer of Latour wines had a right to reasonable compensation because they had tailored their respective businesses to a large extent to the brands and products and sales methods of their principals.

Hence also in case of a lawful termination of a contract one has to account for investments that were made by the terminated party in the relationship or to justified and reasonable expectations that were built up with the terminated party in the preceding years.

5.4 A view from the perspective of employee protection

The end of the affair between employer and employee in the workplace means that there is no reasonable expectation anymore that the problems that have arisen between employer and employee, regardless of their nature, will be resolved – what in marital relationships is called the irretrievable breakdown. Whether it is a deteriorating financial position of the employer, a serious breach of confidence due to alleged performance-related issues of the employee, or simply the end of the road: parties, or at least one of them, have come to the conclusion that continuation will be pointless.

Continuing the employment relationship is a continuation of an affair that is not wanted – and as I have shown, that will in most cases lead to nothing but *Verelendung*.

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82. See the Mattel and Latour decisions of the Hoge Raad (HR 21 februari 1992, NJ 1993/164 and HR 3 december 1999, NJ 200/120), also see F.B.J. Grapperhaus, De positie van de bestuurder van de Nederlandse beursvennootschap, Ondernemingsrecht 2003, p. 416 etc.

Continuation of an affair that is not wanted would not properly answer to the requirement of equal exchange, simply because any reasonable exchange between parties is prohibited: parties must continue a dead end relationship.

A useful exchange and subsequent quid pro quo could be found here, just as in every relationship that is based on mutual trust in continuation, in the ending of the relationship and the contract in exchange for an adequate compensation for the investments made by the employee in the workplace, or perhaps more adequately: in the business of the employer.

What kind of investments do employees then make in their employment and the employer's business? Barendrecht has described this type of investment as *employer-specific investments*.[83]
Some examples, aimed at the employment relation, are the following.

From the very start of their employment, individuals invest in their working environment, by getting acquainted to their colleagues as well as relevant contacts with their employers' clients, purely to be able to acquire knowledge of the workplace and to achieve a better understanding of the mechanics at work. Also from the start any individual will to some extent try to grasp the working processes that are in place in his new workplace, and during his employment he will process other innovations at work to achieve an up-to-competitive-standards workplace. Furthermore, employees will direct their know-how and experience towards their employer's business needs. And then people also invest by aligning their life outside the workplace with that workplace, for example by moving their house and family closer to work or if that is not possible: by investing much time in commuting from home to work.

Those who prefer to see this concept of employer-specific investments as unrealistic have apparently never heard of the American company called U-Haul.

When I spent three weeks with my family in a camper in the western states of the US, one night we camped on a site where our neighbours at the next camping spot were American citizens who slept in a small tent in front of their Buick, close to a gigantic lorry, which carried the U-Haul sign. The man explained he had just changed jobs from North Carolina to Oregon, so they were on their way to their next stop in life

83. M. Barendrecht, 'Een verfijndere kantonrechtersformule: de beste basis voor ontslagbescherming', Arbeidsrecht 2004, 38, p. 4-13.

in Portland, with their entire belongings, great and small, in the U-Haul truck: he was dismissed by his former employer, so he had to leave behind a large part of what he had invested in a professional career back in North Carolina. So much for modern time carpetbaggers![84] And may I, rhetorically of course, pose the question to all of you: who is still in touch with more than 5% of his former working environment? Finally, how many times has one found that certain knowledge on working processes or even commercial and market knowledge became useless as soon as a change of employer had occurred, simply because the knowledge was too closely related to that specific employer?

It would seem that under a fair and reasonable employment law system an employee whose contract is terminated by his employer is entitled to a certain amount of compensation for the fact that he may leave behind part of his professional life, investments he made in that particular workplace and all that was attached to it.

From a strict civil law point of view, these investments should be compensated for if the relationship is terminated by either party for other reasons than an urgent cause for which the employee can be blamed. In the case of a premature termination, the employee is at once deprived of the investment he made in this employer's specific business, taking into account the reasonable expectations he may have had about continuation of the employment, given his investments.

These employer-specific investments together constitute the stake that the employee had in the partnership with his employer, a partnership which was formatted as an employment contract.

This line of reasoning by the way has a certain tradition in Dutch employment law. Traces of it go back as far as 1947, when certain members of the Stichting van de Arbeid, the Dutch independent advisory body in which employers organisations and unions are represented, expressed as their opinion that the ground for a

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84. Carpetbaggers were poor Americans who travelled westward to seek jobs and fortune in the post-depression years, (as described in John Steinbeck, The carpetbaggers, 1936) so the comparison should be seen as a hyperbole.

85. Stichting van de Arbeid, Advies inzake de Herziening van het ontslagrecht, p. 16-17; more indirect references can be found in Bles, Wet op de Arbeidsovereenkomst, part IV, p. 9 and M. G. Levenbach,Het nieuwe burgerrechtelijke ontslagrecht, Alphen a/d Rijn, 1954, p. 115.

severance payment was to be found in the loss of goodwill that resulted for the employee from the termination of his employment.[85]

If this is all still too far-fetched to you, let me end this part of the story with a landslide-Oscar-winning movie from 1948, 'The best years of our lives'. It deals with four war veterans from World War II who return from Europe to their Nowhere Hometown, expecting to get something in return for those best years they had invested in the war: one is crippled, one has a severe psychosis, one is an alcoholic and number four I always forget. They find that what they had invested in the community by fighting a war for America is not repaid in any way. They are not offered proper jobs or housing accommodation, they are not helped in anyway with their problems, their country-specific investments are lost forever. A more tragic but less glamorous variety that will appeal even more to my dear father and many of my uncles who had to go and fight in Indonesia in the late nineteenfourtees can be found in one of the greatest post-war novels of Dutch literature, 'Ik heb altijd gelijk', by Willem Frederik Hermans, which deals with the disillusions of a soldier returning from the so-called 'politional actions' in Indonesia to the colonial homeland, that lost both the war as well as the colony and does not want to have to cope with these returning soldiers.

Whether it is the distributor of Mattel or the importer of Latour, the employee who worked for twenty-five years at the same boss, or the young professional who moved his family all the way from Amsterdam to Deventer, or the veteran from World War II, or the soldier returning from the politional actions in Indonesia – we all have the right to get a compensation for what we have invested and is left as a stake in the business we were employed at.

5.5 Severance payment as the quid pro quo

Termination of a contract, as we have seen, is only equitable if two conditions are fulfilled: even negotiating positions, and an end result that must reflect an adequate quid pro quo This is a very complicated matter to realize between employer and employee in practice, as the employer is the owner of the work and the workplace. The iniquity between the two should be remedied.

As we have seen a prior authorisation will not work here, its unfit to create the evenness in negotiating positions of employee and employer – and if the statistics on the number of prior authorisations granted are not convincing, one should just think of Mrs. Ritico, the HEMA-

assistant shopkeeper, and *See if you care*. To create evenness between employer and employee it is my opinion necessary for the employee to have a legal basis for certainty of payment of his severance, i.e. his share in the employer's business, just as the ILO Convention on the Termination of Employment describes.

So, to avoid the situation of the heroes and villains in the aforementioned examples, and also to provide for adequate legal protection, not just of the employee but particularly protection of true equal exchange or quid pro quo, it is important that when the prior authorisation system is abolished by law, a legal obligation to pay severance following the termination is introduced by that same law.

An employer should then be legally bound to pay a severance pay to his employee upon termination of the employment contract which severance pay is to be established by a standardized calculation method.

That system should also allow employees to go to court in swift proceedings, as swift as the present dissolution proceedings, to ask for a higher severance, if the severance should have been higher than the legal standard considering the circumstances of the case. This system should at the same time make it possible for employers to start similarly swift proceedings if the severance should not have been higher than the legal standard considering the circumstances of the case. And in those rare cases where none of the parties can justify that indeed the end of the affair has been reached, reinstatement of the employee by the court should still be possible.

How should the severance be calculated?

Calculating a reasonable compensation for the employee's investments is not as difficult as it may seem. After all, the employee invested in his ability to work at the employer's business for as long as it lasted. So at the end of the affair, he should get paid an adequate interest. This should not be confused with his wages. Wages are paid for the work itself, they are for the driver driving the vehicle at the instructions of the employer; whereas the ability to work is the vehicle that is tailored to the needs of the employer. For the use of this vehicle, the employer should pay an adequate interest. If we set this ability to work against the total annual remuneration and apply a reasonable and fair interest rate of 8%, the resulting severance pay, i.e. the interest, would be one month's salary per year of service.

5.6 Some remarks on misconceptions on the justification of severance payments

Perhaps this is the place to deal with the theory on the justification of severance payments for a while and try to take away some of the misconceptions that have been formed on this subject.[86]

First of all, severance payments are not meant to be used merely as a substitute for income from labour activities in the near future: to achieve that purpose, most countries – and certainly full-grown EU Member States – have their own system of social security. It is not so long ago that I disqualified the intentions of a former government to compensate unemployment benefits with severance payments[87]. I stand my ground; such a philosophy would lead to the situation where the contributions made by employees themselves to the social security system were in fact no more than an insurance for their own funeral: employees would in that system contribute indirectly towards their own severance payments.

Social security is not to be confused with compensation for early termination of employment. The ILO has recognized this in article 12 of the ILO Convention on the Termination of Employment, that according to its heading deals with 'several allowance and other income protection'. Not only in that heading, but also in the article's text a clear difference is made between severance payment, under subparagraph (a) and unemployment insurance under subparagraph (b).

To make the comparison with marital law again: it would be the same mistake to confuse alimony payments with the appropriation to the other spouse of his or her part of the matrimonial property.

Also, I fail to see why the mere legal ground for severance pay would be compensation for cooperating with a peaceful separation, as some have suggested in the past. Such reasoning would take the principle of

86. A rather exhaustive overview was presented by C.J. Loonstra/W.A. Zondag in their article 'Ontslagvergoedingsrecht: stand van zaken en perspectief', NJB 2000, p. 267 etc.; although their overview may be somewhat outdated I have not come across a more accurate and concise summary of the matter.

87. In law review Sociaal Recht, ed. 2003, issue no.1, 'Ter Visie'; likewise C.G. Scholtens, 'Kabinetsplannen WW en afvloeiingsregelingen: Terug naar af!', in NJB 2002, p. 1896.

the ILO that lasting peace can only be established when it is based on social justice [88] to an extreme.

Strictly speaking the legal ground for a severance payment is found in the fact that the contract is severed by one party, and that in such case a quid pro quo in paying out the employee's stake in the prematurely ended relationship with his employer is paid out. Whether such severance is due, and how much is due will then entirely depend on the circumstances. The fact that the employee is willing to cooperate with a peaceful settlement may perhaps in some cases lead to a higher severance, based on the principle of 'nuisance value', but is certainly not a ground in itself for severance. A different view might in fact make severance nothing more than ransom money.

Yet the prior authorisation system has created this effect: if you do not pay what is due we will not let you out of this employment contract – but as we have seen in the beginning, that was never the original purpose of the introduction of the prior approval system by the CWI in World War II.

I must disappoint any optimists here today once more: researchers from the University of Amsterdam already in 1999[89] reported that it occurs that the CWI is willing to cooperate with a prior approval of termination, provided the employer promises to pay a certain severance. And when it comes to the cantonal courts, the judge must in an interim decision indicate to the employer what severance he will award should the employer maintain his request. The employer can then withdraw his request and pretend a happily-ever-after with the employee. This has led many times to the practice of employees, after the withdrawal of the employer's request, filing their own request for termination, asking for the severance payment that the court had already announced it would award. And to make life an even greater mystery, it then happens ever so often that the court in fact dissolves the employment contract, but awarding a different severance to the employee in the process. One might say that indeed the path of the lord is dark and rarely pleasing.

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88. Philadelphia declaration of the ILO, II.
89. R.M. Beltzer, R. Knegt, A.D.M. van Rijn, Ontslagvergoedingen, 's-Gravenhage 1999, p. 69.

5.7 Severance payment as a stop to light dismissals

As I have pointed out it is not easy to say very accurately what effect a prior authorisation system has on employers for not bringing forward light dismissal cases. This would be the same in a system where protection does not so much come from prior authorisation but from a legal obligation to pay a severance in case of a termination of employment. In the research reports of both Research voor Beleid as well as Bureau Bartels one can find that employers at least know where they stand when it comes to cantonal court proceedings: they do realise at least by approximation the price they may have to pay to the employee by means of severance pay. A legal standard for severance pay should however, as in the French Code du Travail be accompanied by the possibility for employees to ask for a higher severance if the dismissal is unfair. The one-plus-one of a legal standard for severances and a possibility for an extra severance to be adjudicated by the court makes this form of protection system very effective, as it will discourage the employer in any intention he might have for a light dismissal, as one may assume that he will not easily want to pay a considerable severance amount. And if he still wants that, then the employer simply should pay.

5.8 Employability

There is still one remaining issue: where does this leave the principle of employability? I am not as cynical about the concept of employability as Lord Wedderburn expresses, where he merely places it in the context of the need that capital has for employable workers. To the contrary, the right to employability should be seen as a consequential right to the worker's fundamental right to pursue their self-development.[90]

In a modern society an employee is helped more with employability, training or education, social security and support on the labour market in securing a new job, than with a prior authorisation scheme. The European Directive on collective redundancies very clearly

90. Also to be read in par. II of the Philadelphia Declaration of the ILO; I have more elaborately worked on this thesis in F.B.J. Grapperhaus, Werknemersconcurrentie. Beperkingen aan concurrerende activiteiten van de ex-werknemer ten opzichte van zijn voormalig werkgever, dissertation, University of Amsterdam, 7 december 1995, Deventer 1995, p. 92-94.

describes this in article 2.2[91], where it defines the aim of the consultations between employer and workers representatives in case of a collective redundancy: that consultation is *inter alia* meant to '…cover ways and means of (….) mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.'

In my view employability, training and social security are indeed very relevant for the proper functioning and competitiveness of a labour market. But they operate in a parallel universe in a different ménage à trois of work, training and social security. Work can only be found and continued if a person has a certain minimum level of capability *and* willingness to be trained, also to prevent him from falling back upon the minimum of social security.

One should bear in mind carefully that employability does not mix well with the employee's entitlement to a severance that both mirrors and adequately compensates him for the investments he made in his employer's business, just as Mattel and Latour received their compensation for the investments they made in their respective principal's business.

Whether an employer should be rewarded for actively investing in the general employability of his employee remains to be seen. In my view it should be possible to create a system in which employees build up training rights through a special individually earmarked budget paid for and retained by the employer. Yet I would not want to go so far as suggested by Verhulp[92] to create what he calls a 'backpack'-model, which completely transforms the severance payment into training. My first objection is a principled one. The compensation for employer-specific investments is an individual right of the employee and I see no legal ground why that employee could be forced to spend acquired compensation rights for a specific purpose, i.e. education or training. Secondly, it is not easy to establish a model in which all various types and levels of training, and even more importantly: need and want for training, could fit in. And thirdly, employability is a responsibility for all concerned: employee, employer as well as government.

But I do agree with Verhulp that a certain obligation needs to be imposed on the employee so as to ensure that he will at least be

91. European Directive 98/59 of 20 July 1998, *Eurlex* 31998L0059.
92 E. Verhulp, Ontslagrecht in beweging?, l.c., p. 22-23.

involved himself in maintaining or even increasing his employability, or should I say employability rate. However I find that such obligation should be linked more to social security than to termination and severance. As I have set out earlier, the triangle of work, education and social security has its own existence in a universe that is parallel but still not the same as the one of employment, contract and termination.

6 Is a system of prior authorisation through either a government body or an independent court the appropriate method of protection for employees against undue termination? And what could be a practicable alternative?

Prior authorisation does not serve the purpose of protecting employees from undue or unjust loss of their jobs against their economically much stronger employers. It is counter-productive in the few situations where authorisation is denied, as in those situations it only creates *Verelendung*.

It increases costs needlessly; money that could have been spent for better purposes, for instance on something like employability.

It creates great injustice for employees with fixed-term contracts, long-term disabled and chronically sick employees.

It is hypocritical to the extent that in the vast majority of cases prior authorisation is granted anyhow either by the CWI or the cantonal court – and it does not in any way serve as a meaningful instrument on the greater labour market.

In this lecture I have not even addressed the fact that the CWI is considered by many lawyers as an institute of which the mere existence – let alone its modus operandi – is a flagrant violation of the European Treaty on Human Rights, as is the present form of the dissolution proceedings before the cantonal court with its lack of appeal options: I think the polder parties would be willing to except such minor shortcomings, provided the system of prior authorisation had proven to be a useful tool for a more equitable employment system.

Prior authorisation is ineffective when it comes to protection to employees against loss of employment. And it is an anomaly in modern times when we realise that the end of the affair means the contract will lose its raison d'être.

On many occasions I have referred to Paul van der Heijden's metaphor of the contract as the 'ticket to ride'[93] for the employee.

Perhaps prior authorisation is then best characterized as a 'ticket to leave' – which once again brings some harrowing thoughts to my mind.

In this lecture I have pointed at the tension that lies in the triangular relation of employment, contract and termination. This triangle is not sufficient to help us explain why a system under which prior authorisation is required for termination of employment does not provide adequate protection. A more fitting ménage à trois is perhaps that of protection, cost and practicability. Protection has its cost and it would seem that parties can only gain from the protection and use of the incurred costs if the protection is construed and managed in a practicable way.

Both the labour market as well as the legal system to which it applies must take care of the protection of employees in such a way that the employee can return to work as soon as possible in the best possible circumstances.

A legal obligation to pay severance on the basis of set standards, accompanied by a social security system that puts more emphasis on education and training, would be a much better option for effective protection of employees against loss of their employment.

In the beginning I stood still very briefly at the Villepin-proposal that caused riots in France in the early spring of 2006. I am very much against a system that would make dismissal of certain groups, be it youths or elderly people, easier than of other groups. If there should be any difference, it can only follow from the true different aspects of the workers in question relating to their employment, such as the years they have been employed by their employer, their salary position, the job requirements and the training and experience they had before the job.

I would call for a protective system based on the following principles.

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93. P.F. van der Heijden in his contribution to: De arbeidsovereenkomst in het Nieuw BW, Deventer 1991, p. 10 etc.

Outline in ten rules of a new system for the Dutch polder on the protection of employees against termination of employees

1. An employment contract can only be terminated on valid grounds as set out in article 4 of ILO Convention on the Termination of Employment, which means reasons connected with the capacity or conduct of the worker or based on the operational requirements of the business. In accordance with ILO Convention on the Termination of Employment, article 11, a reasonable notice term, preferably one to two months, should be observed.

2. If the employer terminates, he must pay a legally standardized severance payment.

3. If the termination occurs as a result of or in relation to events or circumstances – and now I am more or less copying from the French labour law as codified in the Code du Travail[94] – for which the employer is to blame or which are his responsibility, the employee may seek resolve for a higher severance pay than would follow from the legal standard through swift court proceedings. Such circumstances also include the situation in which the employee is not properly heard by the employer on the intended dismissal (along the lines of article 7 of ILO Convention on the Termination of Employment). If the termination occurs as a result or in relation to events or for which the *employee* is to blame or which are his responsibility, the *employer* may seek resolve for a lesser severance pay than would follow from the legal standard through swift court proceedings.

4. The legal standard on severance payments shall relate to the loss of the employee's stake in the employer's business, and will be calculated on the basis of one month gross employment income per service year.

94. Code du travail, art. L 122-14-4 and more or less L 122 14-5; the latter deals with smaller enterprises and only makes 'abuse of dismissal' qualify for extra severance, whereas bigger enterprises fall under the scope of the aforementioned L 122-14-4 that provides for extra severance in case of a dismissal on 'unserious grounds'.

5. If the employer has terminated for invalid grounds, i.e. other grounds than capacity or conduct of the employee, the employee may either opt for the court to reinstate him in his position with the employer or opt for a considerable extra severance. If the employer has through his own conduct caused the employee to terminate the contract, the employee may in the same swift court proceedings claim a severance which the court may or may not adjudicate.

6. If the employer feels that he has increased the employee's employability considerably during his employment contract, he may also bring this forward as a circumstance that might to a limited extent lead to a lower severance. On the other hand an employer who has merely profited from his employee and has not in any way given the employee the opportunity to develop his skills or know how, may face a higher severance.

7. A severance payment can be paid as a cash payment, be it tax efficient or not, but also partly in other forms, such as payment of post-employment education or coaching or outplacement.

8. In case of a collective redundancy the same rules will apply unless the employer and the unions reach agreement on a different calculation method, which may be the case if the employer's financial status does not allow for a social plan based on payment of the full legal standard. In such a case, the employer and the unions may agree upon giving redundant employees part of their entitlement by means of a share in prospective results of the employer's business in the near future.

9. Proceedings should take place before an independent court, with expertise in labour law. The employee may be represented by himself or be represented by anyone he deems fit, regardless whether it is a union representative or a professional lawyer.
   All claims of an employee or employer relating to a termination of the employment will expire irrevocably one year after the end date of the employment.

10. Any fixed term contract may have an accumulated duration of maximum one year. After that every contract is an indefinite period contract. Every indefinite period contract is governed by the rules of notice term and severance pay as described above.

'Labour is not a commodity' as the Philadelphia declaration clearly states in its preamble[95]. This means that a worker deserves adequate protection not only if he or she is wronged by an unfair termination of employment, but also if he or she is terminated lawfully, yet is not compensated for his personal investments in the employer's business and the loss of opportunities as a result of the termination.

The mechanism of adequate protection needs to be re-established in Dutch employment law. Meanwhile, we should not forget that the true challenge does not lie in saying farewell to regulations that still date back to the upside-down-world of the German occupation, but in further research on how we can manage true and efficient harmonisation of the EU labour markets and the applicable rules, to the benefit of our competitiveness as European Union, and subsequently to the benefit of the workers who built up the common market. This lecture should therefore not be seen as an example of the ambitions I have set for my position here in Maastricht.

It is my goal to work towards more integrated cross-border research on the mechanics of employment markets and their legal systems and I feel assured that the University of Maastricht and more specifically the capacity group that I am part of will provide the best possible environment to start up such research.

Before ending this lecture I wish to address several people in the audience today who have played a certain role along the long and winding road leading to the Minderbroedersberg.

First of all there is Arnold Keizer who has been a very welcome critic of my endeavours and who certainly 'pimped' my lecture, without him I would perhaps never have found out about the link between Pufendorf and Nieuwenhuis.

Then, my English is a mixture of seventy percent Monty Python, twenty-nine percent Beatles and a mere one percent legal English. Thanks to Robert-Jan de Bruin, for his editing this strange brew;

I am grateful to have Leonard Verburg around in my practice group as an inspiring counterpart, but even more Sietze Hepkema who on quite a different level was a very laidback coach through my far-too-many-

95. Philadelphia Declaration of the ILO.

daydreams over the past six years, simultaneously dealing with my tempers;

Then there is Aalt-Willem Heeringa who, although my first introduction was rather chaotic from behind the wheel of a 1957 Mercedes during a rally, has made great effort to build the chair that I now sit on since January this year;

Malva, Wilfried and Edith, who have whole-heartedly accepted me in their midst, as is evidenced by the mouse pad of Saskia's computer;

Saskia, I quite owe you for the way you have stood up in 2005 to make my position as European employment and simply employment professor possible, when let us say times were a little hard; your gift for coaching the four of us and also getting in the money we need for our little sub-group, is only equalled by my capacity to show you how you can efficiently make use of your computer, your inbox for instance;

Paul van der Heijden, when I heard you describe the qualities of Max Rood as a tutor in a very moving speech you made in December 2001, I must admit that I thought you were giving a description of yourself; you have always been a perfect guide with vast amounts of patience for an uncontrollable entity like myself, and playing an important part in my being here as well;

Then there is Ad Geers; how much I would have liked to address him, I had found the fitting indecent quotes to address him already last winter, when I heard about his much too soon and tragic death; I think I am finding my way around at the University by myself, but I can assure you, without Ad there is definitely less spirit;

I definitely wish to address my father, who never showed the least of concern when during my younger years I showed more interest in learning the Top Fourty songs out of my head and always, always kept believing in me, well here's to you, I was so much older then, I am younger than that now, so: I have hidden a string of song titles in my lecture, let us see if your brilliant historian's mind can find them;

I will briefly say a word to my mother, who was born in this town and had to leave for Amsterdam with her mother, three brothers and four sisters when she was eight years old, after her father, my grandfather, had suddenly died. This great misfortune happened in the midst of the depression years. Yet you have always told us, Ankje, Marjan and

myself, that you only have recollections of Maastricht as an everlasting summer town, which was the ultimate argument to make me choose for this University;

My children Ferdinand, Christine, Valentijn and Max, it is each of your own specific personalities that have inspired me all those years to plead the case of the individual as being special and deserving individual attention;

Finally Florentine, it is you who learned me to finally grow up and show some personal development myself, where would I be without you? Not here today.

Ik heb gezegd.